166-719

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 672.

THE OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY OF NEBRASKA AND THE OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY OF IOWA, PLAINTIFFS IN ERROR,

vs.

SPENCER SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED DECEMBER 12, 1896.

(16,451.)

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INDEX.

	Original.	Print.
Caption	1	1
Appellants' abstract of record	2	1
Petition	3	1
Exhibit A—Agreement between the Omaha and Council Bluffs Railway and Bridge Company of Council Bluffs, Iowa, and the Omaha and Council Bluffs Railway and Bridge Company of Omaha, Neb., May 14, 1887	8	4
Amendment to petition	12	6
Amended and substituted answer	12	6
Statement as to consolidation	14	7
Evidence for plaintiff	14	7
Articles of incorporation of the Omaha and Council Bluffs Railway and Bridge Company of Nebraska, executed March 11, 1887, and filed March 15, 1887	14	7
Articles of incorporation of the Omaha and Council Bluffs		

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 19, 1897.

	Original.	Print.
Railway and Bridge Company of Nebraska, executed April 1, 1887, and filed April 1, 1887	18	10
Articles of incorporation of the Omaha and Council Bluffs Railway and Bridge Company of Iowa	23	12
Ordinance authorizing the Omaha and Council Bluffs Railway and Bridge Company to construct, operate, &c., street railway, approved October 29, 1886	26	14
Acceptance of ordinance	31	16
Assignment of claims for taxes	32	17
Proposition for tax	32	17
Certificate of city clerk	34	18
Receipts	39	20
Contract of May 14, 1887	40	21
Ordinance permitting the use of certain streets by Council Bluffs Street Railway Company, approved Aug. 11, 1868	45	23
Contract and lease, October 1, 1888	48	25
Act of Congress authorizing construction of bridge, approved March 3, 1887	52	27
Mortgage to Mercantile Trust Company, January 2, 1888	56	29
Paragraph 12 of stipulation in case of Crossland *et al. vs.* Omaha and Council Bluffs Railway and Bridge Company of Nebraska	67	35
Section 358 of Cobbey's Consolidated Statutes of Nebraska, edition of 1881	68	35
Testimony of T. J. Evans	69	35
Plaintiff rests	69	36
Evidence for defendants	69	36
Testimony of George F. Wright	69	36
Defendants rest	72	37
Judgment	73	38
Assignment of errors	75	39
Appellee's amendment to abstract	79	40
Demurrer	80	40
Admissions	82	41
Testimony of T. J. Evans	84	42
George F. Wright	85	42
Opinion	88	43
Judgment	99*a*	50
Petition for writ of error	100	50
Order allowing writ of error	101	51
Writ of error	102	51
Assignment of errors	104	52
Citation and service	107	54
Clerk's certificate	108	54

1 Pleas before the supreme court of Iowa in a cause therein entitled Spencer Smith, appellee, *vs.* Omaha & Council Bluffs Railway & Bridge Co. of Nebraska and Omaha & Council Bluffs Railway & Bridge Co. of Iowa, appellants.

Be it remembered that on the 18th day of Sept., 1894, there was filed in the office of the clerk of the supreme court of Iowa by the appellants a printed abstract of the record, the same being duly served as required by law and in the words and figures following, to wit:

2 In the Supreme Court of Iowa, at October Term, A. D. 1894.

SPENCER SMITH, Appellee, *vs.* OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE CO. OF Nebraska and Omaha & Council Bluffs Railway & Bridge Co. of Iowa, Appellants.	At Law.

Appeal from the judgment of the district court of Pottawattamie county, Iowa, Hon. H. E. Deemer, judge.

Harl & McCabe, attorneys for appellee.
Wright & Baldwin, attorneys for appellants.

Appellants' Abstract of Record.

3 On the 13th day of January, 1893, the plaintiff herein filed in the district court of Pottawattamie county, Iowa, his petition, which was in words and figures following, to wit:

Petition.

The plaintiff states that he is a citizen, resident and tax-payer of the city of Council Bluffs, Iowa; that the defendant, The Omaha and Council Bluffs Railway and Bridge Company, of Omaha, Nebraska, is a corporation duly organized and existing under and by virtue of the laws of the State of Nebraska; that the defendant, The Omaha and Council Bluffs Railway and Bridge Co., of Council Bluffs, Iowa, is a corporation duly organized and existing under and by virtue of the laws of the State of Iowa; that the object and purpose of the creation of the said Iowa corporation was, among other things, the construction, maintenance and operation of motor lines in the city of Council Bluffs, Iowa, and, incidentally, the construction of a railway and wagon bridge across the Missouri river between the cities of Council Bluffs, Iowa, and Omaha, Nebraska; that the defendant, The Omaha and Council Bluffs Railway and Bridge Company, of Iowa, did on or about October 29, 1886, obtain from the city of Council Bluffs, Iowa, a franchise for the construction, maintenance and operation of an electric motor line over and along the streets and avenues, and alleys of said city of Council

Bluffs, under certain conditions and restrictions, more fully
4 shown by said ordinance as set out on pages 356–'7–'8 and '9,
of the complete ordinances of the city of Council Bluffs, edition of 1887; that thereafter said Iowa corporation filed its acceptance of said ordinance with the restrictions, conditions and limitations therein imposed; that thereafter the said Iowa corporation obtained a charter and franchise for the construction, operation and maintenance of a railway and wagon bridge across the Missouri river, said franchise being conferred by an act of Congress of the United States, entitled "An act authorizing the construction of a bridge across the Missouri river, between the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and for other purposes," approved March 3, 1887; that thereafter said Omaha and Council Bluffs Railway and Bridge Company, of Iowa, under and by virtue of the provisions of chapter XIII of the Acts of the Twenty-first General Assembly of the State of Iowa, presented to the city council of the city of Council Bluffs, Iowa, a petition for a special election to be held by the electors of said city for the purpose of voting a tax to aid said corporation in the construction of a highway bridge across the Missouri river; that in pursuance of said petition and under said act of the Iowa legislature, said special election was called, and, on the second day of November, 1886, a tax of twelve mills per centum on the taxable property within the city of Council Bluffs, Iowa, was voted by the electors of said district to aid said Iowa corporation in the construction of said bridge across said Missouri river; that in pursuance of said vote, said tax was duly certified to the board of supervisors of the county of
county of Pottawattamie and State of Iowa and was by
5 them levied upon the taxable property within the city and collected in the taxes of the years 1888 and 1889; that there was levied against the property of this plaintiff and collected said tax of twelve mills per centum, which was paid to the county treasurer of Pottawattamie county, Iowa, said tax of twelve mills per centum being levied against all the taxable property of said city and the amount thereof paid by the owners of the property therein; that afterwards, on the 14th day of May, 1887, the said Omaha and Council Bluffs Railway and Bridge Company, of Iowa, fraudulently, wrongfully and without right or authority of law made and executed to the Omaha and Council Bluffs Railway and Bridge Company, of Nebraska, a foreign corporation, a pretended lease of its franchise, rights and properties for the period of ninety-nine years, including its franchise under the ordinance of the city of Council Bluffs hereinbefore referred to and the aforesaid franchise conferred upon it by act of Congress for the construction of a highway bridge across the Missouri river, and including all of its property of every kind, nature and description and including therein a purported fraudulent, void and illegal transfer of the tax of twelve mills per centum on the taxable property of Council Bluffs, Iowa, voted to said corporation to aid it in the construction of said highway bridge, a copy of which said transfer, assignment, lease and conveyance is hereto attached, marked "Exhibit A," and made a part hereof; that

said bridge was never in fact constructed by the defendant, The Omaha and Council Bluffs Railway and Bridge Company, of Iowa,
but that the same was constructed by the Nebraska corpora-
6 tion; that the names of the two corporations are identical;
that at the times hereinbefore referred to, they were officered and controlled by the same persons; that the said corporations and their officers confederated and conspired to enable said Omaha and Council Bluffs Railway and Bridge Company, of Nebraska, a foreign corporation, without right and under guise, pretense and color of said tax voted in aid of the Iowa corporation to obtain the moneys paid into the hands of the county treasurer by the tax-payers of the city of Council Bluffs, Iowa, under said tax so levied and assessed; that notwithstanding the fact that said bridge never was in fact constructed by the Iowa corporation, and notwithstanding the fact that there was no warrant or authority in law for the voting of a tax to aid a foreign corporation in the construction of a highway bridge and no such tax had been voted, and notwithstanding that there was no warrant or authority in law for the taking or receipt of money or proceeds of said taxes in the hands of the county treasurer by the said Nebraska corporation or said Iowa corporation, the said defendants, concealing the fact that said bridge had been constructed by the foreign corporation and concealing the facts hereinbefore alleged, to wit: the transfer of the rights and franchises of the Iowa corporation to the Nebraska corporation, the transfer of said tax to the Nebraska corporation, the execution of the contract, copy of which is hereto attached as "Exhibit A," and concealing the fact of the existence of the two corporations of identical name, wrongfully and unlawfully obtained from the county treasurer of Pottawattamie county the proceeds and amount of said tax in
his hands, receiving from said county treasurer on Novem-
7 ber 14, 1888, the sum of $24,596.31, June 5, 1889, $10,011.62,
January 2, 1890, the sum of $19,255.77; that said moneys were paid over to and receipted for by the defendant, the Nebraska corporation, in the name of the Omaha and Council Bluffs Railway and Bridge Company without revelation of its true character, by the aid and connivance of the Iowa corporation and its officers and through mistake of fact by the county treasurer and through the aforesaid fraud and concealment of defendants herein, the same being wrongfully obtained by the defendant and being by it held to the use and benefit of the tax-payers paying the same; that said moneys were never earned by the Iowa corporation and that neither of said defendants had any right or authority in law to take or receive the same; that assignments have been made to this plaintiff of the rights and claims of divers citizens and tax-payers of the city of Council Bluffs, Iowa, a list whereof is shown by "Exhibit B," hereto attached, of the moneys and taxes levied and assessed against their property and paid by them, aggregating the sum of twenty-four thousand three hundred and forty-two dollars; that the said moneys so paid by the plaintiff and his assignors were paid to the county treasurer and by said county treasurer included in the aforesaid payments to the defendant hereinbefore referred to and that

said moneys are now held by the defendant, The Omaha and Council Bluffs Railway and Bridge Company, to the use and benefit of this plaintiff.

Wherefore, plaintiff demands judgment against the defendant for the sum of twenty-four thousand three hundred and forty-
8 two dollars, with interest thereon at six per cent. per annum from November 14, 1888, and the costs of this suit.

EXHIBIT A.

Know all men by these presents, that the Omaha and Council Bluffs Railway and Bridge Company, of Council Bluffs, Iowa, a corporation duly organized and existing under the laws of the State of Iowa, herein designated as the party of the first part or Iowa corporation, hereby makes and enters into the following contract and agreement with the Omaha and Council Bluffs Railway and Bridge Company, of Omaha, Nebraska, a corporation duly organized and existing under the laws of the State of Nebraska, herein designated as the party of the second part, or Nebraska corporation, as follows:

First. The said Omaha and Council Bluffs Railway and Bridge Company, of Council Bluffs, Iowa, for the consideration hereinafter named, hereby sells, assigns, transfers and sets over to the said Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, all that certain tax of twelve mills per centum on the assessed valuation of the property of the city of Council Bluffs voted to the said Omaha and Council Bluffs Railway and Bridge Company of Council Bluffs, Iowa, by the electors of the said city of Council Bluffs, Iowa, on the second day of November, A. D. 1886, to aid in the construction of a highway bridge over the Missouri river, between the cities of Omaha, Nebraska, and Council Bluffs,
9 Iowa, together with the right and authority to receive the same as and when collected by and from the treasurer of Pottawattamie county, Iowa, the same as the said party of the first part could do under the provisions of chapter XIII of the Laws of Iowa, passed in the year 1886, being the Session Laws of the Twenty-first General Assembly of the State of Iowa, and the said party of the first part further agrees, if so requested, to receive said tax when and as collected by and from said treasurer and pay the same over to the party of the second part when so demanded.

Second. The said Omaha and Council Bluffs Railway and Bridge Company of Council Bluffs, Iowa, for the consideration hereinafter named, hereby lets, leases, grants, and gives unto the said Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, for the term of ninety-nine years from the 29th day of October, A. D. 1886, all the said party of the first part's rights to interests and property under and by virtue of and in a certain ordinance entitled "An ordinance authorizing the Omaha and Council Bluffs

Railway and Bridge Company to construct, operate and maintain street railroads in the city of Council Bluffs, and defining the powers and duties of said company," passed and approved by the city council of the city of Council Bluffs, Iowa, on the 29th day of October, 1886, and all the rights and privileges therein granted to the said party of the first part, the same being hereby transferred to the said party of the second part, to have, use and enjoy as fully and to the same extent and under the same terms, conditions and restrictions as the said party of the first part is entitled to do by the terms and provisions thereof.

10 Third. The said Omaha and Council Bluffs Railway and Bridge Company of Council Bluffs, Iowa, for the consideration hereinafter named, hereby lets, leases, gives and grants unto the Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, for the term of ninety-nine years from the 3d day of March, 1887, all the said party of the first part's rights to interest and property under and by virtue of and in a certain act of Congress entitled "An act authorizing the construction of a bridge across the Missouri river between the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and for other purposes," approved March 3, 1887, and all the rights and privileges therein granted to the said party of the first part as the incorporation organized under the laws of the State of Iowa, its successor or assigns, to take and receive the grant conferred by said act, the same being hereby transferred to the said party of the second part, to have, use and enjoy during said term as fully and to the same extent and under the same terms, conditions and restrictions as the said party of the first part is entitled to do by the terms and provisions thereof, and for all of which the said party of the second part hereby undertakes and agrees to give in full consideration therefor to the said party of the first part for the benefit of its stockholders one-half ($\frac{1}{2}$) of all the shares of the full paid-up capital stock of the said Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, the receipt whereof is hereby acknowledged, and the said party of the first part hereby covenants with said party of the second part that it holds said property, rights and franchises by good and perfect right
11 and title; that it has good right and lawful authority to sell, transfer, lease and convey the same as aforesaid, and that the same is free and clear of all liens and encumbrances whatsoever and it covenants to warrant and defend the title to the same against the lawful claims of all persons and parties whomsoever.

In witness whereof, this instrument is duly executed by the parties hereto, the said Omaha and Council Bluffs Railway and Bridge Company of Council Bluffs, Iowa, having caused its corporate name to be hereto affixed by its president, and these presents countersigned by its secretary, and the said Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, having caused its corporate name to be hereto affixed by its president, and

these presents countersigned by its secretary, and all done this 14th day of May, 1887.

OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY OF COUNCIL BLUFFS, IOWA,

[SEAL.] By JOHN T. STEWART, *President.*

Attest: GEO. F. WRIGHT,

Secretary O. & C. B. R'y & B. Co. of Council Bluffs, Iowa.

OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY OF OMAHA, NEBRASKA,

[SEAL.] By JOHN T. STEWART, *President.*

Attest: GEO. F. WRIGHT,

Secretary O. & C. B. R'y & B. Co. of Omaha, Nebraska.

Duly acknowledged by John T. Stewart, as president of both companies.

12 On the 13th day of February, 1893, the plaintiff filed an amendment to his petition, which amendment was in words and figures following to wit:

Amendment to Plaintiff's Petition.

Comes now the plaintiff and for amendment to his petition herein says that the assignment referred to in plaintiff's original petition was in writing, copy whereof is hereto attached, marked "Exhibit A," and made a part hereof; that The Omaha and Council Bluffs Railway and Bridge Company, Nebraska corporation, defendant herein, has never complied with the provisions of the laws of Iowa with reference to foreign corporations and has not and never has had authority to operate and maintain a motor or bridge line in the State of Iowa, or to conduct business therein.

"Exhibit A" is a list of the different tax-payers who have assigned their claims to the plaintiff.

On the 10th day of April, 1893, the defendants filed their amended and substituted answer to plaintiff's petition and amendment thereto, which amended and substituted answer was in words and figures following, to wit:

Amended and Substituted Answer.

Comes now the defendant in the above-entitled action and for amended and substituted answer to plaintiff's petition and amendment to petition filed herein states:

13 Paragraph 1. That they deny each and every allegation in plaintiff's petition and amendment to petition contained, except such as are hereinafter admitted or in some other manner controverted.

Paragraph 2. The defendant, The Omaha and Council Bluffs Railway and Bridge Company, of Nebraska, admits that it is a corporation organized under and by virtue of the laws of Nebraska.

Paragraph 3. The defendant, The Omaha and Council Bluffs Railway and Bridge Company, of Iowa, admits that it is a corporation organized under and by virtue of the laws of the State of Iowa.

Paragraph 4. Defendants admit the execution of the paper attached to plaintiff's petition and marked "Exhibit A."

Paragraph 5. Defendants, for further answer, aver that the plaintiff has no right in law or equity to maintain this action, for that the plaintiff is not the real party in interest, as the petition upon its face shows that this is an action brought for the recovery of a tax, and a private individual cannot maintain such an action.

Paragraph 6. Defendants further state that the petition on its face shows that the alleged cause of action set forth in plaintiff's petition is barred by the statue of limitations, for that more than five years have elapsed since said tax was voted and levied and more than five years have elapsed since the alleged cause of action set forth in plaintiff's petition accrued, and that the alleged
14 cause of action stated in plaintiff's petition did not accrue at any time within five years before the commencement of his action thereon.

Wherefore, defendants ask judgment against plaintiff for costs.

Another case in the same court, being No. 9074, between the same parties hereto, in which the same cause of action was set forth, except upon claims of different tax-payers, who were not included in the first suit, and in which the same pleadings were filed, was consolidated for trial with the case at bar, No. 8933, and the two cases were tried together.

On the 11th day of July, 1893, this cause came on for trial at Council Bluffs, Pottawattamie county, Iowa, before the Hon. H. E. Deemer, judge of said court.

The plaintiff, to sustain the issues on his part, introduced the following testimony:

1st. Articles of incorporation of the Omaha and Council Bluffs Railway and Bridge Company of Nebraska, executed March 11, 1887, and filed in the office of the clerk of Douglas county, Nebraska, March 15, 1887, and which articles were in words and figures following, to wit:

Articles of Incorporation of the Omaha & Council Bluffs Railway & Bridge Company of Nebraska.

Article I.

15 We, the parties hereto, hereby certify that we do hereby associate ourselves together as a body corporate, under the laws of the State of Nebraska, and by the name of the Omaha and

Council Bluffs Railway and Bridge Company, with its principal place of business in the city of Omaha, Nebraska, and with power to establish and maintain branch offices in any other State or Territory in the United States, and a branch office of said company is hereby established in the city of Council Bluffs, Iowa.

Article II.

The general nature of the business to be transacted by this corporation shall be to construct, operate and maintain a bridge across the Missouri river at and opposite the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and also a steam, electric, motor, horse, elevated, cable or other line of railway, and a public way across said bridge, and within the counties of Douglas, Nebraska, and Pottawattamie, Iowa, with the termini thereof in the said cities of Omaha and Council Bluffs.

This corporation shall have and possess all the powers given it by law, and such as are usually incident to corporations of this character, and among which is the power to make contracts, acquire and transfer all kinds of property necessary to the transacting of its business, and including the right and power to borrow money on notes, bonds and mortgages, and to secure the payment of the same by pledging all or any portion of its property and its income for such purpose, provided that the indebtedness of the company shall at no time exceed two-thirds of the capital stock.

16 Article III.

The amount of the capital stock shall be six hundred thousand dollars, and the authorized capital one million dollars, divided into shares of one hundred dollars each, ten per cent. of the stock subscribed to be paid at date of subscription, and the remainder as ordered by the board of directors.

Article IV.

The corporate power of this corporation shall be vested in a board of directors consisting of not less than six nor more than fourteen, one-half of said board always to be residents of Council Bluffs, Iowa, the number to be determined each year at and before their annual election by the stockholders. In connection with said board in the management of the company's affairs there shall be appointed annually by said board an executive committee of not less than four nor more than six, of which the president shall be one and the chairman thereof, and a majority of either body shall constitute a quorum. A record of the proceedings of each shall be kept by the secretary of the company. The stockholders' annual meeting shall be held at the company's office in Omaha, Nebraska, on the second Tuesday in January of each year, commencing in A. D. 1888.

It shall commence its corporate existence on the 15th day of March, A. D. 1887, and terminate on the same day in the year 1937.

17 Article V.

The first board of directors shall consist of the following persons, viz:

Guy C. Barton, J. H. Millard, Frank Murphy, T. J. Evans, John T. Steward and George F. Wright.

And shall continue in office until their successors are elected and qualified. Immediately after the organization of the company (corporation) and so soon as ten per cent. of the capital stock is subscribed, the board of directors may meet and adopt such rules, regulations and by-laws as they may deem best for the company, and may change the same from time to time as may be thought best. The general officers of the company shall consist of a president, vice-president, secretary and treasurer.

Article VI.

The individual and private property of the members and stockholders shall be exempt from all corporate debts and liabilities.

Article VII.

These articles may be amended by a two-thirds vote of the stock of the company at any regular meeting of the stockholders, thirty days' notice of such amendment being first given them, in such manner as may be prescribed by the board of directors, and whenever any duty, act, or other thing, or manner of doing the
18 same is not provided for in these articles, or in the by-laws, it may be prescribed and done with full force and effect by the board of directors by the adoption of a resolution embodying the same, and duly entered of record in the books of the company, which shall also be open to the inspection of the public and every other party.

In witness whereof, we, as subscribers hereto, and incorporators herein, hereby execute and adopt the foregoing articles of incorporation this 11th day of March, A. D. 1887.

FRANK MURPHY.
T. J. EVANS.
GEO. F. WRIGHT.
J. H. MILLARD.
GUY C. BARTON.

Duly acknowledged.

It was admitted that these last-mentioned articles were never filed with the secretary of state of Nebraska, and that the Nebraska corporation never acted under the same.

2d. Articles of incorporation of the Omaha and Council Bluffs Railway and Bridge Company of Nebraska, executed April 1, 1887, and filed in the office of the clerk of Douglas county, Nebraska, April 1, 1887, and likewise filed in the office of the secretary of state of Nebraska, and which articles were in words and figures following, to wit:

Articles of Incorporation of the Omaha & Council Bluffs Railway & Bridge Company of Nebraska.

Article I.

19 We, the parties hereto, hereby certify that we do hereby associate ourselves together as a body corporate, under the laws of the State of Nebraska, and by the name of the Omaha and Council Bluffs Railway and Bridge Company, with its principal place of business in the city of Omaha, Nebraska, and with power to establish and maintain branch offices in any other State or Territory in the United States, and a branch office of said company is hereby established in the city of Council Bluffs, Iowa.

Article II.

The general nature of the business to be transacted by the corporation shall be to construct, operate and maintain a bridge across the Missouri river at and opposite the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and also a steam, electric, motor, horse, elevated, cable or other line of railway, and a public way across said bridge, and within the counties of Douglas, Nebraska, and Pottawattamie, Iowa, with the termini thereof in the said cities of Omaha and Council Bluffs.

This corporation shall have and possess all the powers given it by law, and such as are usually incident to corporations of this character, and among which is the power to make contracts, acquire and transfer all kinds of property necessary to the transacting of its business, and including the right and power to borrow money on notes, bonds and mortgages, and to secure the payment of the same by pledging all or any portion of its property and its income for such purpose, provided that the indebtedness of the company shall at no time exceed two-thirds of the capital stock.

20 Article III.

The amount of the capital stock shall be six hundred thousand dollars, being the amount necessary to construct said railway and bridge, and the authorized capital one million dollars, divided into shares of one hundred dollars each, ten per cent. of the stock subscribed to be paid at date of subscription, and the remainder as ordered by the board of directors.

This corporation shall have the power to use its capital stock or any portion thereof by the first or original issuance thereof, in the payment for the construction of any portion of its bridge or railway, for materials furnished and used therefor, and for the purchase of any franchises deemed necessary in carrying on its business, or any part thereof, and it may issue its stock direct to the parties, person, corporation or company, entitled to the same therefor, and when so issued it shall be taken, received and considered by all parties in any manner interested therein, or in the affairs of this corporation,

or in regard to any indebtedness of this corporation, as fully paid-up stock at par or face value, and non-assessable thereafter and no liability for corporate debts shall be incurred at any time by its members, stockholders nor by its officers issuing the same by reason of such issuance thereof.

Article IV.

The corporate power of this corporation shall be vested in a board of directors consisting of not less than six nor more than
21 fourteen, one-half of said board always to be residents of Council Bluffs, Iowa, the number to be determined each year at and before their annual election by the stockholders. In connection with said board in the management of the company's affairs there shall be appointed annually by said board an executive committee of not less than four nor more than six, of which the president shall be one and the chairman thereof, and a majority of either body shall constitute a quorum. A record of the proceedings of each shall be kept by the secretary of the company. The stockholders' annual meeting shall be held at the company's office in Omaha, Nebraska, on the second Tuesday in January of each year, commencing in A. D. 1888.

It shall commence its corporate existence on the 1*t*s day of April, A. D. 1887, and terminate on the same day in the year 1937.

Article V.

The first board of directors shall consist of the following persons, to wit:

Guy C. Barton, T J. Evans, Frank Murphy, John T. Stewart, George F. Wright and J. H. Millard.

And shall continue in office until their successors are elected and qualified. Immediately after the organization of the corporation and so soon as ten per cent. of the capital stock is subscribed, the board of directors may meet and adopt such rules, regula-
22 tions and by-laws as they may deem best for the company, and may change the same from time to time as may be thought best. The general officers of the company shall consist of a president, vice-president, secretary and treasurer.

Article VI.

The individual and private property of the members and stockholders shall be exempt from all corporate debts and liabilities.

Article VII.

These articles may be amended by a two-thirds vote of the stock of the company at any regular meeting of the stockholders, thirty days' notice of such amendment being first given them, in such manner as may be prescribed by the board of directors, and whenever any duty, act, or other thing, or manner of doing the same is not provided for in these articles, or in the by-laws, it may be pre-

scribed and done with full legal force and effect, by the board of directors by the adoption of a resolution embodying the same, and duly entered of record in the books of the company, which shall also be open to the inspection of the public and every other party.

In witness whereof, we, as subscribers hereto, and incorporators herein, hereby execute and adopt the foregoing articles of incorporation this 1st day of April, A. D. 1887.

GUY C. BARTON.
FRANK MURPHY.
JOHN T. STEWART.
GEO. F. WRIGHT.
T. J. EVANS.

Duly acknowledged.

23 3d. Articles of incorporation of the Omaha and Council Bluffs Railway and Bridge Company of Iowa, which articles were in words and figures following, to wit:

Articles of Incorporation of the Omaha & Council Bluffs Railway & Bridge Company of Iowa.

Article I.

We, the parties hereto, hereby certify that we do hereby associate ourselves together as a body corporate, under the laws of the State of Iowa, and by the name of the Omaha and Council Bluffs Railway and Bridge Company, with its principal place of business in the city of Council Bluffs, Iowa, and with power to establish and maintain branch offices in any other State or Territory in the United States, and a branch office of said company is hereby established in the city of Omaha, Nebraska.

Article II.

The general nature of the business to be transacted by the corporation shall be to construct, operate and maintain a bridge across the Missouri river at and opposite the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and also a steam, electric, motor, horse, elevated, cable or other line of railway, and a public way across said bridge, and within the counties of Douglas, Nebraska, and Pottawattamie, Iowa, with the termini thereof in the said cities of Omaha and Council Bluffs.

24 This corporation shall have and possess all the powers given it by law, and such as are usually incident to corporations of this character, and among which is the power to make contracts, acquire and transfer all kinds of property necessary to the transacting of its business, and including the right and power to borrow money on notes, bonds and mortgages, and to secure the payment of the same by pledging all or any portion of its property and its income for such purpose, provided that the indebtedness of the company shall at no time exceed the capital stock paid in.

Article III.

The amount of the capital stock shall be three hundred thousand dollars, and the authorized capital one million dollars, divided into shares of one hundred dollars each, ten per cent. of the stock subscribed to be paid at date of subscription, and the remainder as ordered by the board of directors.

Article IV.

The corporate powers of this corporation shall be vested in a board of directors consisting of not less than six nor more than fourteen, one-half of said board always to be residents of Council Bluffs, Iowa, the number to be determined each year and before their annual election by the stockholders. In connection with said board in the management of the company's affairs there shall be appointed annually by said board an executive committee of not less than four nor more than six, of which the president
25 shall be one and the chairman thereof, and a majority of either body shall constitute a quorum. A record of the proceedings of each shall be kept by the secretary of the company. The stockholders' annual meeting shall be held at the company's office in Council Bluffs, Iowa, on the first Monday in January of each year, commencing in A. D. 1887.

It shall commence its corporate existence on the 20th day of October, A. D. 1886, and continue for twenty years thereafter.

Article V.

The board of directors shall consist of the following persons, viz: George F. Wright, John T. Baldwin, I. A. Miller, T. J. Evans, John T. Stewart, Wm. Siedentopf and J. F. Evans.

And they shall continue in office until their successors are elected and qualified. Immediately after the organization of the company (corporation) and so soon as ten per cent. of the capital stock is subscribed, the board of directors may meet and adopt such rules, regulations and by-laws as they may deem best for the company, and may change the same from time to time as may be thought best.

The general officers of the corporation shall consist of a president, vice-president, treasurer and secretary.

26 Article VI.

These articles may be amended by a two-thirds vote of the stock of the company at any regular meeting of the stockholders, thirty days' notice of such amendment being first given them, in such manner as may be prescribed by the board of directors, and whenever any duty, act, or thing, or manner of doing the same is not provided for in these articles, or in the by-laws, it may be prescribed and done with full legal force and effect, by the board of directors by the adoption of a resolution embodying the same, and duly en-

tered of record in the books of the company, which shall always be open to the inspection of the public and every other party.

In witness whereof, we, as subscribers hereto, and incorporators herein, hereby execute and adopt the foregoing articles of incorporation this 20th day of October, A. D. 1886.

Signed by W. F. Sapp and many others and duly acknowledged.

4th. Ordinance of the city of Council Bluffs, approved October 29, 1886, entitled "An ordinance authorizing the Omaha and Council Bluffs Railway and Bridge Company to construct, operate, etc., street railway," which ordinance was in words and figures following, to wit:

Ordinance.

To the Omaha & Council Bluffs Railway & Bridge Company.

27 SECTION 1. Be it ordained by the city council of the city of Council Bluffs, That consent, permission and authority is hereby given and granted to, and vested in the Omaha and Council Bluffs Railway and Bridge Company, and its successors and assigns, to construct, equip, maintain and operate, for the term of twenty-five years, upon the conditions hereinafter found, a single or double track street railway, with the necessary switches, turnouts and side tracks along and over the streets, alleys, avenues and bridges of and within the city of Council Bluffs hereinafter designated, and such other streets, avenues and alleys of said city as said company may hereafter select, with the consent and approval of said city.

And in constructing and operating said railway said company shall have the right to intersect and cross the track or tracks of any street or other railway, and the right to connect its main line with its depots, stations, stables or car-houses situated on any lot fronting on such main line by a proper and suitable track laid thereto.

SEC. 2. The streets and avenues specifically referred to in section 1 hereof are the following: Broadway street from the Missouri river to north city limits, South First street, Graham avenue to Sixteenth avenue, Sixteenth avenue from High street to Third street, Third street from Sixteenth avenue to Tenth avenue, Tenth avenue from Third street to South Sixth street, and South Sixth street from Tenth avenue to Broadway street, provided no steam motive power shall be used on any of said streets and avenues named, except on Broadway west of Eleventh street.

28 SEC. 3. The tracks of said company shall be laid so as to conform to the established grade of any street on which the road may be built, wherever the city has or hereafter may establish such grade. Where the streets are not graded said company may lay its tracks so as to conform to the surface of such streets, but that said company shall grade its road-bed and conform to the established grade of all streets at its own expense, where it is authorized to lay down tracks under this ordinance, whenever the city shall establish the grade of such street or any part thereof.

In case the city shall at any time pave any street along which

said railway may run, said company shall at its own expense at the same time, with the same material, pave the space between the rails of its track and one foot outside of the rails, so that it shall substantially correspond with the paving of the street outside of the rails and track.

Where tracks are laid upon a street already paved, the company shall pay the property-owners abutting for the paving between, the rails and one foot outside thereof. And in laying its tracks said company shall restore said streets, whether paved or not, to as good condition as before the laying down of the tracks thereon; and shall conform to all grades and keep waterways and culverts in good repair at its own expense for the passage of water along or across its tracks.

SEC. 4. The city of Council Bluffs shall be held in no manner liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or for any delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same; or from the improvement or repair of any street, or damages to property-owners along streets where tracks may be laid down by said company.

SEC. 5. The said Omaha and Council Bluffs Railway and Bridge Company shall file its written acceptance of this ordinance, and of the rights therein granted, within thirty days after its passage and approval with the city clerk of said city, and when its acceptance has been so filed, said company shall be vested with and may enter upon the use and enjoyment of all the rights, privileges, grants and immunities conferred by this ordinance, and be subject to the duties and obligations thereby imposed, or by any other ordinance hereafter passed, for the regulation of the exercise and use by said company of the rights hereby (herein) granted, and not in conflict herewith.

SEC. 6. And be it further ordained: That said railway and highway bridge company shall fully complete said street railway and bridge from the Missouri river to South First street within two years from the date of the adoption and passage of this ordinance.

And said company shall complete the balance of said street railway within three years from the date of the passage of this ordinance on the remaining streets and avenues herein granted, and a failure of said company to lay down its tracks on said remaining streets and avenues within said three years shall forfeit all right to use the same at the option of the city council.

And that said company shall be and is hereby prohibited from leasing said high bridge for any other railway purposes than for street railways. That the said company shall in no case charge each passenger carried on said railway and across said bridge, from any part of its street railway lines in the city of Council Bluffs to its western terminus in Omaha, to exceed ten cents for each person, and not to exceed five cents within the limits of the city of Council Bluffs.

SEC. 7. That the failure of the said company to complete the laying down and equipment of the street railway tracks, and the construction of said bridge, within the time as provided in this ordinance, shall operate as a full forfeiture of all rights of said company to receive or have paid over to it any part or portion of the said tax voted and donated by the freehold resident tax-payers of said city, as provided in chapter XIII of the Laws of Iowa, 1886.

SEC. 8. And be it further ordained: That said street railway shall connect with and be operated over and across the highway bridge when constructed across the Missouri river between Council Bluffs and Omaha. Said bridge to be a high bridge, as defined by an act of Congress for the construction of the same. Said bridge to be used and operated solely and exclusively as a street-railway, public-travel and wagon bridge. Provided, further, that in case the said bridge company, or their successors or assigns, shall use or attempt
31 to use said highway bridge for any other purpose than herein all rights hereby conferred or granted to said bridge company shall be forfeited and all rights under this ordinance shall become null and void.

5th. The acceptance of the Omaha and Council Bluffs Railway and Bridge Company of said last-mentioned ordinance, which acceptance was in words and figures following, to wit:

Acceptance of Ordinance.

To the mayor, city council, and city clerk of the city of Council Bluffs, Iowa.

GENTLEMEN: The Omaha and Council Bluffs Railway and Bridge Company hereby accept the ordinance entitled "An ordinance authorizing the Omaha and Council Bluffs Railway and Bridge Company to operate and maintain street railroads in the city of Council Bluffs, and defining the powers and duties of said company." Passed by said city council on the 29th day of October, A. D. 1886, and said company hereby accepts in writing said ordinance and the rights therein granted on this, the 30th day of October, 1886, and hereby consents to the terms, conditions and provisions thereof, as fully and to the same extent as the city has on its part by the passage thereof, and herewith files said acceptance with the city clerk of said city as provided in section 5 of said ordinance.

By order of the board of directors of the Omaha and
32 Council Bluffs Railway and Bridge Company, this 30th day of October, 1886.

(Signed) THOMAS J. EVANS,
President pro Tem. Omaha & Council Bluffs Railway & Bridge Co.

Attest: GEORGE F. WRIGHT, *Secretary.*

6th. Assignment of claims for taxes to Spencer Smith by different parties, which is signed by many different tax-payers, and is in words and figures following, to wit:

Assignment of Claims for Taxes.

For value received, the undersigned hereby sells, assigns and sets over unto Spencer Smith all claims against the Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, and against the *the* Omaha and Council Bluffs Railway and Bridge Company of Council Bluffs, Iowa, and all other persons against whom claims may exist, arising out of the same state of facts, for and because of taxes assessed and levied illegally and through mistake of fact by the city of Council Bluffs, Iowa, in aid of the construction of the motor bridge line across the Missouri river between Council Bluffs and Omaha, and for any and all taxes paid by the undersigned in aid of the construction of said railway bridge.

7th. Proposition for tax:

Proposition for Tax.

33 It was stipulated and agreed that the Omaha and Council Bluffs Railway and Bridge Company of Iowa caused to be presented to the city council of the city of Council Bluffs, a petition asking said council to submit to the qualified electors of said city a proposition to vote a tax of 12 mills per centum on the assessed valuation of the property in said city to aid the said Omaha and Council Bluffs Railway and Bridge Company of Iowa in the construction of a highway bridge across the Missouri river. Said application to be made under and by virtue of the provisions of chapter XIII of the Acts of the Twenty-first General Assembly of the State of Iowa.

That said proposition was submitted by the city of Council Bluffs, Iowa, to the qualified electors of said city, and that at an election a majority of the votes cast were in favor of said tax, and said city clerk of the city of Council Bluffs, Iowa, in accordance with said statute, certified to the county auditor of the county in which said city is situated, to wit: Pottawattamie county, Iowa, the result of said election, the maximum rate per centum of tax voted, the years for which the same were to be collected, the amount to be collected each year, name and designation of the company, the terms and conditions upon which the same when collected was to be paid to said company, together with a copy of the notice under which said election was held, which said certificate was duly recorded with the auditor as provided by said statute.

That thereafter the board of supervisors of Pottawattamie county at the time of the levying of the tax for the years 1887 and
34 1888, levied against the taxable property in said incorporated city for each of the years mentioned a tax of six mills per centum, which was the amount of the tax under the terms and provisions of said vote and the amount under which said certificate was to be levied for each of said years, in the construction of said

highway bridge and that said tax was duly placed upon the tax books of said county for each of said years, and said amount of six mills per centum on the assessed value of said property in said city of Council Bluffs was collected from the tax-payers thereof, and the tax levied, voted and assessed as hereinbefore stated, the same being collected by the county treasurer as provided by law.

8th. Certificate of city clerk to the public and special-election notice, which were in words and figures following, to wit:

Certificate.

F. A. Burke to the public. Filed September 7, A. D. 1887, at 9.10 o'clock a. m.

Office of the city clerk of the city of Council Bluffs, Iowa.

STATE OF IOWA, } *ss*:
Pottawattamie County, }

To the county auditor of the county of Pottawattamie, Iowa:

I, F. A. Burke, city clerk in and for the city of Council Bluffs, Iowa, hereby certify that at a special election of the resident free-hold tax-payers of the city of Council Bluffs, held therein on the 2d day of November, A. D. 1886, at which said special election
35 the question of taxation and voting aid in the construction of a highway bridge over the Missouri river between the cities of Omaha, Nebraska, and Council Bluffs, Iowa, as provided by chapter XIII of the Laws of 1886, being the Laws of the Twenty-first General Assembly of the State of Iowa, to aid in the construction of a highway bridge over the Missouri river, to the Omaha and Council Bluffs Railway and Bridge Company, was submitted to the election of said incorporated city. A majority of the votes then and there polled were "For taxation" by a tax of twelve mills per centum on the assessed valuation of the property in said city of Council Bluffs, to be levied and become due, collectible and payable to said Omaha and Council Bluffs Railway and Bridge Company, one-half thereof, or six mills levy, in the year 1888, provided said highway bridge is fully completed and in use and in operation by said date, a true, correct and exact copy of the notice under which said election was held being made a part hereof, in words and figures following:

Special-election Notice.

Notice is hereby given to the electors of the city of Council Bluffs, Iowa, that a special election has been ordered by the city council of said city, to be held therein on the 2d day of November, A. D. 1886, at the same time and places, and by the said clerks and judges of election as the general election, to be held in the said city for the year 1886, and under the same registration of voters thereof.
36 Said special election is for the purpose of submitting to the voters of said city the question of aiding the Omaha and

Council Bluffs Railway and Bridge Company in the construction of a highway bridge over the Missouri river at a point commencing at the foot of Broadway street, or within 300 feet thereof, on either side, in the city of Council Bluffs, Iowa, at and opposite the same in Iowa, and terminating opposite in the city of Omaha, Nebraska, by a tax of twelve mills per centum on the assessed valuation of the property in said city of Council Bluffs, to be levied and become due, collectible and payable, one-half thereof or six mills levy in the year 1887, and the remaining half thereof or six mills levy in the year 1888, provided said highway bridge is fully completed and in use and in operation by said date.

In consideration of such aid, said company, its successors or assigns, shall be restricted to charge not to exceed the following rates of toll across said bridge, viz: For one person, not to exceed five cents; for one-horse buggy, and driver, not to exceed ten cents; for two horses, buggy and driver, not to exceed fifteen cents; for two horses, wagon and driver, not to exceed twenty cents.

The board of supervisors shall be instructed and are authorized to cause to be levied each year on the taxable property of said city, and the same collected each year, said tax at the times and in the proportion above named and as required by law. Before said tax, or any part thereof, shall become due, collectible or payable, said highway bridge shall be fully completed and in use and op-
37 eration, and after the completion of said highway bridge, the rates of toll as found hereinbefore shall become obligatory and binding upon said company, its successors and assigns.

At said special election, the question of taxation shall be submitted to the electors of the city of Council Bluffs, and the form of ballots to be used thereat shall be "For taxation" and "Against taxation," the same to be deposited in separate ballot-boxes. And if a majority of the votes polled be "for taxation," then the clerk of the city shall forthwith certify to the county auditor of Pottawattamie county the result of such election, the maximum rate per centum of the tax thus voted, the year during which the same is to be collected and the amount to be collected each year, the name or designation of the company to which said aid is voted, and the terms and conditions upon which the same when collected is to be paid to said company, together with the exact copy of this notice.

Said tax shall be collected in the same manner and subject to the same laws after they are collected or collectible as other taxes in conformity with the terms and conditions of this notice.

The moneys collected shall be paid out by the county treasurer to the treasurer of said company, or to the treasurer of Council Bluffs, upon the order of the president or a majority of the directors of said company, or the order of the city council of said city, at any time after such council or a majority of its members shall
38 have certified to the county treasurer that the conditions required as set forth in this notice for said special election, have been complied with, and said council, or a majority of its members, shall have certified to the county treasurer that the conditions required as set forth in this notice have been complied with,

and said council, or a majority of its members, shall make said certificate whenever such conditions shall have been so performed.

All done by order of said city council.

In witness whereof, I have hereunto set my hand officially as mayor of said city, and the same attested by the city clerk thereof, this 20th day of October, A. D. 1886.

Attest: WILLIAM GRONEWEG,
Mayor of the City of Council Bluffs, Iowa.

F. A. BURKE, *City Clerk.*

And by the terms and conditions of said notice submitting the question of taxation to the city electors, a tax of six mills levy on the assessed valuation of property in the city of Council Bluffs, Iowa, is to be made and levied by the board of supervisors of Pottawattamie county, Iowa, in the year 1887, at the time of levying ordinary taxes therein as provided by law in such cases.

In witness whereof, I have hereunto set my hand and official signature as the city clerk of said city, and affixed the seal of the city hereto in witness thereof.

39 All done at my office therein this 7th day of September, 1887.

[SEAL.] F. A. BURKE,
Clerk City of Council Bluffs.

9th. Four receipts given to the treasurer of Pottawattamie county, Iowa, for payments made by him of taxes collected in aid of bridge across the Missouri, which receipts were as follows, to wit:

Receipts.

Nov. 14, 1888.

Hon. John Plumer, treasurer Pottawattamie county, Iowa.

MY DEAR SIR: As the treasurer of the Omaha & Council Bluffs Railway & Bridge Company, I hereby make application for such of the tax collected in aid of the construction of the company's bridge over the Missouri river between the cities of Omaha and Council Bluffs as may be in your possession, and I hereby acknowledge the receipt from you as treasurer of said county of twenty-four thousand five hundred and ninety-six and thirty-one one-hundredths dollars to apply on said tax collected by you.

J. H. MILLARD,
Treasurer Omaha & Council Bluffs Railway & Bridge Company.

OMAHA, *May* 15, 1889.

40 Received of J. H. Plumer, treasurer of Pattawattamie county, Iowa, ten thousand dollars to apply on tax voted the Omaha & Council Bluffs Railway & Bridge Company.

J. H. MILLARD, *Treasurer.*

Received Council Bluffs, March 20, 1889, of John Plumer, treasurer of Pottawattamie county, Iowa, eighteen thousand eight hundred and nine and forty-seven one-hundredths dollars, being the amount of money now in my hands, collected for the Omaha & Council Bluffs Bridge Company up to March 1, 1890.

OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY,
By J. H. MILLARD, *Treasurer.*

OMAHA, *Dec.* 31, 1891.

This will acknowledge the receipt this day from J. H. Plumer, county treasurer Pottawattamie county, of the sum of three hundred eighty-two dollars ($382.00), being balance of taxes due this company from said county to date.

J. H. MILLARD,
Treasurer Omaha & Council Bluffs Railway & Bridge Company.

10th. Contract between the Omaha and Council Bluffs Railway & Bridge Company of Iowa, and the Omaha & Council Bluffs Railway & Bridge Company of Nebraska, which was in words and figures, following, to wit:

Contract.

Know all men by these presents that the Omaha & Council Bluffs Railway & Bridge Company of Council Bluffs, Iowa, a cor-
41 poration duly organized and existing under the laws of the State of Iowa, herein designated as the party of the first part, or Iowa corporation, hereby makes and enters into the following contract and agreement with the Omaha & Council Bluffs Railway & Bridge Company of Omaha, Nebraska, a corporation duly organized and existing under the laws of the State of Nebraska, herein designated as the party of the second part, or Nebraska corporation, as follows:

First. The said Omaha & Council Bluffs Railway & Bridge Company of Council Bluffs, Iowa, for the consideration hereinafter named, hereby sells, assigns, transfers and sets over to the said Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, all that certain tax of twelve mills per centum on the assessed valuation of the property in the city of Council Bluffs voted to the said Omaha and Council — Railway and Bridge Company of Council Bluffs, Iowa, by the electors of the said city of Council Bluffs, Iowa, on the 2d day of November, A. D. 1886, to aid in the construction of a highway bridge over the Missouri river between the cities of Omaha, Nebraska, and Council Bluffs, Iowa, together with the right and the authority to receive the same as and when collected by and from the treasurer of Pottawattamie county, Iowa, the same as the said party of the first part could do under the provisions of chapter XIII of the Laws of Iowa, passed in the year

1888, being the Session Laws of the Twenty-first General Assembly of the State of Iowa. And the said party of the first part agrees, if so requested, to receive said tax when and as collected by
42 and from said treasurer and pay the same over to the party of the second part when so demanded.

Second. The said Omaha and Council Bluffs Railway and Bridge Company of Council Bluffs, Iowa, for the consideration hereinafter named, hereby lets, leases, grants and gives unto the said Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, for the term of ninety-nine years from the 29th day of October, 1886, all the said party of the first part's rights to interests and property under and by virtue of and in a certain ordinance entitled:

"An ordinance authorizing the Omaha and Council Bluffs Railway and Bridge Company to construct, operate and maintain street railroads in the city of Council Bluffs, and defining the powers and duties of said company."

Passed and approved by the city council of the city of Council Bluffs, Iowa, on the 29th day of October, 1886, and all the rights and privileges therein granted to the said party of the first part, the same being hereby transferred to the said party of the second part, to have, use and enjoy as fully and to the same extent and under the same terms, conditions and restrictions as the said party of the first part is entitled to do by the terms and provisions thereof.

Third. The said Omaha and Council Bluffs Railway and Bridge Compa-y of Council Bluffs, Iowa, for the consideration hereinafter named, hereby lets, leases, gives and grants unto the Omaha
43 and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, for the term of ninety-nine years from the 3d day of March, 1887, all the said party of the first part's interest and property under and by virtue of and in a certain act of Congress entitled:

"An act authorizing the construction of a bridge across the Missouri river between the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and for other purposes."

Approved March 3d, 1887. And all the rights and privileges therein granted to the said party of the first part as the incorporation organized under the laws of the State of Iowa, its successors or assigns, to take and receive the grant conferred by said act, the same being hereby transferred to the said party of the second part to have, use and enjoy during said term as fully and to the same extent and under the same terms, conditions and restrictions as the said party of the first part is entitled to do by the terms and provisions thereof, and for all of which the said party of the second part hereby undertakes and agrees to give in full consideration therefor to the said party of the first part for the benefit of its stockholders one-half of all the shares of the full paid-up capital stock of the said Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, the receipt whereof is hereby acknowledged, and the said party of the first part hereby covenants with the said party of the second part that it holds said property, rights and fran-

chises by good and perfect right and title; that it has good
44 right and lawful authority to sell, transfer, lease and convey the same as aforesaid, and that the same is free and clear of all liens and encumbrances whatsoever, and it covenants to warrant and defend the title to the same against the lawful claims of all persons and parties whomsoever.

In witness whereof, this instrument is duly executed by the parties hereto, the said Omaha and Council Bluffs Railway and Bridge Company of Council Bluffs, Iowa, having caused its corporate name to be hereto affixed by its president, and these presents countersigned by its secretary, and the said Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, having caused its corporate name to be hereto affixed by its president, and these presents countersigned by its secretary, and all done on this 14th day of May, 1887.

OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY OF COUNCIL BLUFFS, IOWA,

[SEAL.] By JOHN T. STEWART, *President.*

Attest: GEO. F. WRIGHT,
Secretary O. & C. B. R'y & B. Co. of Council Bluffs, Iowa.

OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY OF OMAHA, NEBRASKA,
By JOHN T. STEWART, *President.*

Attest: GEO. F. WRIGHT,
Secretary O. & C. B. R'y & B. Co. of Omaha, Nebraska.

Duly acknowledged by the proper officers of both companies.

45 11th. Ordinance of the city of Council Bluffs, permitting the use of certain streets by the Council Bluffs Street Railway Company, approved August 11, 1868, which was in words and figures following to wit:

Ordinance.

To the Council Bluffs Street Railway Company.

SECTION 1. Be it ordained by the common council of the city of Council Bluffs: That John Jones, George Marshall, Richard Launsberry, Felix A. Crocker, A. L. Deming, C. F. Hendrie and J. C, Hoffmayr, their associates, successors and assigns, a body corporate, organized under the laws of Iowa, under the name of the Council Bluffs Street Railway Company, be and they are hereby authorized and permitted, and the exclusive right is hereby granted for the term of twenty-five years from the passage of this ordinance, to use Broadway from a point therein opposite the residence of L. W. Babbitt, thence along the same to the east bank of the Missouri

river, and to use Pearl street from the terminus in Broadway to its intersection with Main street, and to use Main street from its intersection with Pearl street to its intersection with the depot grounds of the Council Bluffs and Saint Joseph Railroad Company, and to use Baldwin street from its intersection with Broadway northwardly to —— for the purpose of laying down in and along the same a street railway, and with all necessary side tracks, turnouts and switches; and permission is hereby granted to said corporation to equip the same for the carriage of persons and property for said term of twenty-five years.

46 SEC. 2. That said John Jones and others, their associates, successors and assigns, as said body corporate, be, and they are hereby permitted and authorized to use any other streets or alleys in said city for the purpose of laying down in and along the same branch railways, with all necessary side tracks, turnouts and switches, from any of the trunk lines mentioned in the first section of this ordinance, to any railroad depot, and to any ferry now or hereafter to be established in said city, and permission is hereby granted to said corporation to equip and operate all the same for the conveyance of persons and property for the said term of twenty-five years.

SEC. 3. The said corporation shall, within one year from the passage of this ordinance, lay down and equip its trunk lines along Broadway, and along Pearl and Main streets, as specified in the first section of this ordinance, and shall, within two years from the passage of this ordinance, lay down and equip its lines along Baldwin street. A failure in this respect on the part of said corporation shall, at the option of the common council of said city, forfeit all privileges hereby conferred, and said corporation shall lay down and equip its branch ways as specified in the second section of this ordinance, as soon as practicable after any such depot or ferry is established; a failure in this respect, and after reasonable notice from the authorities of the city, to lay down and equip any such branch way shall, at the option of said council, forfeit all rights and privileges conferred by the second section of this ordinance.

47 SEC. 4. That said corporation, at its own cost, but under the direction of the city authorities, shall grade and lay down its tracks, side tracks, turnouts and switches, so as to conform as nearly as practicable to the grades of the streets as the same are now, or as they shall hereafter be established, and shall, when specially required by the city authorities, make and keep in repair safe and convenient crossings over side ditches at the intersections of streets and alleys.

SEC. 5. That said corporation shall not stand its cars at the intersection of streets and alleys, nor shall it leave any such cars standing unattended in any street or alley, nor shall it construct any track, side track, turnout or switch, nor shall it use or operate the same as to unnecessarily hinder or prevent the use of the streets and alleys by other vehicles and footmen.

SEC. 6. That said corporation, in the operation of said street railway, shall be regarded as a common carrier of persons and prop-

erty, and, as such carrier, shall receive, carry and deliver persons and their baggage, and may, at its option, receive, carry and deliver express goods and other freights.

SEC. 7. (All cars used or operated upon any and all the lines of street railway shall have painted thereon in bold letters the following words on both sides of each car: "Council Bluffs street railway.") That said corporation shall make out and post on its car tables of rates for persons and property of all kinds, which rates for persons shall not exceed 25 cents for each person
48 from any point in the city to any ferry, nor more than the sum of 10 cents for the carriage of each person in all other cases; nor shall the rate for the carriage of property exceed the rates fixed by the ordinance for the regulation of common carriers.

SEC. 8. This ordinance shall take effect and be in force from and after its publication according to law, provided that said company, through their proper officers, shall file their acceptance of the same in the city recorder's office within ten days from the date of its passage, and, provided further, that said company shall pay for the publication of this ordinance at the rate usually charged for the publication of ordinances.

12th. Contract and lease between the Omaha and Council Bluffs Railway and Bridge Company of Nebraska, and the Council Bluffs Street Railway Company, made October 1st, 1888. Said contract was in words and figures following to wit:

Contract and Lease.

Whereas, on the 21st day of September, 1888, the board of directors of the Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, did adopt the following resolution, to wit:

Resolved, That the president and secretary, for and on behalf of the Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, are hereby authorized and directed to enter into a contract and lease with the Council Bluffs Street Railway
49 Company of Council Bluffs, Iowa, for its system of street railway lines in said city, and such as may hereafter be added to its system of street railways therein, upon the terms and conditions agreed on by and between this board and the executive committee of said company, and,

Whereas, the board of directors of the Council Bluffs Street Railway Company did, on the 1st day of October, 1888, adopt the following resolution, to wit:

Resolved, That the executive committee of the Bluff Street Railway Company is hereby authorized and directed for and on behalf of this company to consummate and close up in writing the agreement with and contract to lease the company's system of street railways in Council Bluffs, as per terms and conditions agreed on between said companies.

Now this contract and lease made and entered into by and be-

tween said companies in pursuance of said agreement and the foregoing resolutions, witnesseth:

That the said Omaha & Council Bluffs Railway & Bridge Company of Omaha, Nebraska, does hereby lease from the Council Bluffs Street Railway Company, for the term of twenty-five years from this date, its entire system of street railways now in operation in Council Bluffs, Iowa, consisting of its Broadway Street line, its line from Broadway on Sixteenth street to the Union transfer depot, its Pearl and Main Streets line from Broadway to the Rock Island passenger depot, including and covering all extensions and additions that shall be made and added to said system, together
50 with all its rolling stock, horses, mules, iron, ties, car-house and stables, and other property of every kind and description.

The said Omaha & Council Bluffs Railway & Bridge Company hereby agrees to and does lease said property for said term and further agrees and undertakes to proceed at once to double-track and equip with electrical apparatus and operate with electricity the Broadway line from a point near Indian creek to the Methodist church the same as its own line is equipped and to be operated from said Indian creek to the city of Omaha. It further agrees to double-track where necessary and equip and operate with electricity the Pearl and Main Streets line of the said street railway company within eighteen months of this date, and also within two years therefrom to equip and operate with electricity said company's Sixteenth Street line to the transfer, or construct, equip and operate a new line from the Pearl and Main Streets line to said transfer, as may hereafter be determined. It also agrees to construct, equip and operate such other and additional extensions to said street railway system as may be agreed on by and between the parties hereto, all to be done for and at the actual cost cash thereof.

In consideration for this lease and contract, the said Omaha & Council Bluffs Railway & Bridge Company hereby agrees and undertakes to and does guarantee the payment of the principal and interest of such bonds as may be issued by the Council Bluffs Street Railway Company, and it further agrees to take such bonds,
51 if required to do so, at ninety-five cents on the par or face value thereof, the proceeds to apply towards the payment of the construction account, which it will have against said street railway as the terms of this contract are carried out.

The said Omaha & Council Bluffs Railway & Bridge Company further agrees to pay during said time a fixed annual rental of eight thousand dollars ($8,000.00) per annum, payable semi-annually on the first days of April and October of each year.

It is mutually agreed that any of the property turned over under this contract to the railway & bridge company which shall be sold or disposed of otherwise during said term, shall be accounted for to said street railway company at the actual cash price received therefor, and it is further mutually agreed that until such time as said lines now operated by horse-power shall be equipped and operated by electricity, they shall be operated by the street railway company

as at present operated, but the proceeds arising therefrom shall be paid over to the railway & bridge company from and after this date. Executed in duplicate.

In witness whereof, the Omaha & Council Bluffs Railway & Bridge Company have caused these presents to be signed by its president, countersigned by its secretary, and attested by its corporate seal, and the Council Bluffs Street Railway Company has caused these presents to be signed by its executive committee, witnessed by its secretary and attested by its corporate seal, this the
52 1st day of October, A. D. 1888.

OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY.
[SEAL.] JOHN T. STEWART, *President.*

Attest: GEO. F. WRIGHT, *Secretary.*

COUNCIL BLUFFS STREET RAILWAY COMPANY,
By GUY C. BARTON,
[SEAL.] T. J. EVANS, *Executive Committee.*

Attest: GEO. F. WRIGHT, *Secretary.*

13th. An act of Congress authorizing the Omaha & Council Bluffs Railway and Bridge Company, a corporation organized under the laws of the States of Nebraska and Iowa, to construct and maintain a bridge across the Missouri river, approved March 3, 1887, which act was in words and figures following, to wit:

Act of Congress.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Omaha and Council Bluffs Railway and Bridge Company, an incorporation organized under the laws of the States of Nebraska and Iowa, its successors or assigns, is hereby authorized to construct and maintain a bridge across the Missouri river at the point between the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and at least one-third of a mile from any other bridge, as shall best
53 promote the public convenience and welfare and the necessities of business and commerce, and also to construct and maintain the accessory work necessary to secure the best practicable channelway for navigation, and to confine the flow of water to a permanent channel at such point. That said bridge, and all property belonging thereto or connected therewith, may be constructed, maintained and used as combined railway and wagon bridge, for the safe and convenient passage of wagons, carriages, stock, steam, cable and street cars, foot passengers and all road travel. That said bridge shall not be of less elevation in any case than fifty feet above extreme high-water mark, as understood at the point of elevation, to the lowest part of the superstructure; and the piers of said bridge

first-mortgage bonds to the extent of five hundred thousand dollars, and may in such manner as the board of directors shall deem best for the interest of the company in the prosecution of its said bridge and street railways, hypothecate or sell or otherwise dispose of the bonds of the company for the purpose of raising money for the stockholders in aid of the building of its said bridge and street railways now in the process of construction, or the purchase of other street railway lines, and the construction and acquisition of extensions, branches, and the equipment and operation of the same; whereas the said party of the first part is free from all floating debts, but the said party of the first part will require the money herein contemplated to be raised in order to build and complete its said bridge and railways, so that it can transact the highway and railway business of the growing cities of Omaha & Council Bluffs, situated on either side of the Missouri river over which said bridge is to be built and said railway is to run, and which cities and the surrounding country are naturally tributary to its said bridge and railway, and for that purpose as well as to hold and to pro-
58 tect the value of its franchise and property, the said company contemplates the purchase of other street railways and the construction and acquisition of extensions and branches of its street and motor line of railways, and any such as may by amendments to the franchises or charter be hereafter authorized, the construction and completion of said bridge and such street railways as aforesaid to include the making of betterments, the procuring of rights of way, depot grounds, the erection of machine shops, depots, the purchase of equipments, and the acquiring of all the usual appurtenances of a combined railway and wagon bridge, and such railways and all the usual and proper facilities for the transaction of the business of such a bridge and such railways, it being agreed that any part of the bonds certified hereunder to the company not needed or used for the building of said bridge, and the construction or equipment of such railways, may be used for any legitimate, necessary or beneficial purpose of the company and its stockholders.

And, whereas, at a meeting of the stockholders of the party of the first part, duly held in the city of Omaha, in the State of Nebraska, on the 25th day of July, 1887, in pursuance of a call for that purpose duly made by the directors, at which all the stockholders of the company were present and voted, the following preamble and resolutions were unanimously adopted, to wit:

Whereas, the Omaha & Council Bluffs Railway & Bridge Company, under and in pursuance of the provisions of an act of
59 Congress entitled "An act authorizing the construction of a bridge across the Missouri river, between the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and for other purposes," approved March 3, 1887.

And of the provisions of an ordinance entitled, "An ordinance authorizing the Omaha & Council Bluffs Railway & Bridge Company to construct, operate and maintain street railroads in the city of Council Bluffs, and defining the powers and duties of said com-

pany," passed and approved October 29, 1886, by the city council of the city of Council Bluffs, Iowa.

Has commenced to construct a combined railway and wagon bridge across the Missouri river, and to construct, equip and put into operation a line of street-car and motor railway over and across the same, and throughout the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and which is to extend on, over and through the streets, avenues and alleys of said cities, and

Whereas, in the judgment of the stockholders of the Omaha & Council Bluffs Railway & Bridge Company it is deemed expedient that said bridge and street railway be constructed and equipped and put into operation as speedily as practicable, and in order that they may be so constructed it becomes necessary to make and perfect arrangements at once to obtain the necessary means of carrying out the objects of its charter and franchises, therefore be it

Resolved, That we, the stockholders of said company specially notified to be present at a regular stockholders' meeting to be held at the office of this company, at the city of Omaha, on the 25th day of July, 1887, at which meeting all the stockholders of the company are present and voting, do hereby authorize, empower and direct the board of directors of the company to make the necessary arrangements for the immediate and continued prosecution of the work of constructing said bridge and railway, and equipping and operating the same and said railway lines, and be it further

Resolved, That the Omaha & Council Bluffs Railway & Bridge Company of Omaha, Nebraska, be, and it is hereby authorized and empowered to issue its first-mortgage bonds to the extent of and amount of five hundred thousand dollars, bearing date January 2, 1888, payable to the bearer on the first day of January, A. D. 1908, in gold coin of the United States of America, of the present weight and fineness as fixed by the laws of the United States, or in case said bonds, or any of them, be registered, then payable to the registered owner thereof, at its financial agency in the city of New York, with interest thereon at the rate of six per centum per annum, payable semi-annually on the first days of July and January in each year, at the financial agency aforesaid, the payment of the principal and interest on all said bonds to be equally secured by a mortgage or deed of trust bearing date even herewith, conveying to the Mercantile Trust Company of New York City, State of New York, in trust for the owners and holders of said bonds all and singular the property, rights, privileges and franchises within the counties of Douglas, Nebraska, and Pottawattamie, Iowa, or elsewhere now owned by this company, or hereafter acquired and existing in connection therewith and appurtenant thereto, including and meaning to include the entire railway and wagon bridge, with its viaducts and approaches thereto, the entire street railway or motor line running across the same, its rolling stock and equipments, and the franchises therefor, right of way, real estate and all property, real and personal, of every kind and description now acquired, or which may hereafter be acquired by this

company in said States of Nebraska and Iowa, used for or relating to the use and operation of said bridge and railway lines so conveyed, said bonds to be of the denomination of one thousand dollars each, and numbered from one to five hundred inclusive. And be it further

Resolved, That only the first four hundred thousand dollars of said five hundred thousand dollars of bonds hereby authorized to be issued by said company, shall be used for the purpose of raising money in aid of the present construction of said bridge, street railway and motor lines; and the purchase of other street railway lines, and the construction and acquisition of extensions and branches, and the equipment and operation thereof, and that the remaining one hundred thousand dollars of said issue shall be held in trust by the trustee, and only used upon the happening of some unfor-seen accident to said bridge structure, or upon some exigency arising, or contingency happening, whereby an extraordinary expenditure of money shall be required to protect, preserve, or
62 put the company's property in better condition to earn its accustomed or expected or increased revenues. And be it further

Resolved, That the board of directors of this company be, and it is hereby authorized, empowered and directed to cause the issuance of said first-mortgage bonds by said company to an amount not exceeding five hundred thousand dollars, as hereinbefore authorized and directed, and to cause the same to be secured by a first mortgage on all the property of this company, both real and personal, acquired, and that may hereafter be acquired, and to further secure the ultimate payment of said bonds according to the terms and tenor thereof. Be it further

Resolved, That a sinking fund is hereby created by the Omaha and Council Bluffs Railway and Bridge Company to equally secure the payment of the principal and interest of all of said bonds in manner following, viz: Commencing on the 1st day of January, A. D. 1894, said company shall set apart and pay into said sinking fund and invest the same in interest-bearing securities for the benefit of the holders and owners of said bonds twenty thousand dollars each year, for the term of five years from said date, and for the next succeeding ten years said company shall pay into said sinking fund and invest in the same manner for like purposes the sum of thirty thousand dollars each year, it being mutually stipulated and agreed between said company and the holders and owners of said bonds that after the commencement of said last-named terms the said company shall have the right to pay any portion of said
63 bonds held by any holder thereof from any funds said company shall have by paying the holder thereof at the rate of one dollar and ten cents on the face or par value thereof with the accrued interest, if any there be to the end that said mortgage debt may be more fully secured and promptly paid when due, and said bonds, when issued and secured, the board shall be and it is hereby authorized and directed to negotiate and dispose of by sale, hy-

pothecation or otherwise, and deliver said bonds for the purpose hereinbefore set forth. And be it further

Resolved, That the president and treasurer, the proper executive officers of this company, be, and they are hereby authorized to make and execute under the seal of this company and deliver, for the purpose hereinbefore set forth, the first-mortgage bonds of this company to an amount not to exceed five hundred thousand dollars secured upon the bridge and railways now in process of construction, or hereafter to be constructed, within the States of Nebraska and Iowa, each bond to bear date the 2d day of January, A. D. 1888, and payable to the Mercantile Trust Company, or to the bearer, on the 1st day of January, A. D. 1908, with interest at the rate of six per centum per annum to be paid semi-annually on the 1st days of July and January of each year, the principal and interests of said bonds to be paid in gold coin of the present weight and fineness as fixed by the laws of the United States now in force, free from all United States and State taxes. So many and such amount of said bonds as may be required for that purpose not to exceed four hundred thousand dollars thereof, to be set apart and appropri-
64 ated to the payment of the construction and equipment of the combined railway and wagon bridge and street railway and moter line now in process of construction, and the purchase out and construction of such other street-car and motor lines of railway in said cities of Omaha, Nebraska, and Council Bluffs, Iowa, as may be deemed advisable or necessary to accommodate the travel, and transact the business between the said cities as aforesaid. And

Resolved, That said bonds be placed in the hands of the Mercantile Trust Company, trustee, and that the same be disposed of as the executive committee of this company shall deem for the best interest of the stockholders of this company, and to further the speedy construction of said bridge and of said lines of railways. And be it also

Resolved, That the president and secretary, the two proper executive officers of this company, be, and they are hereby authorized to make and execute under the common seal of this company, and deliver to the said Mercantile Trust Company, trustee, of the city of New York, a mortgage or deed of trust, bearing date the 2d day of January, A. D. 1888, conveying all and singular the property of the said Omaha and Council Bluffs Railway and Bridge Company, and its franchises granted by the Congress of the United States, and the franchises granted by the city council of the city of Council Bluffs, Iowa, and embracing and including all the rights, franchises and privileges to it granted and held within the city of Omaha, and the county of Douglas, and the State of Nebraska, and the city of Council Bluffs, and the
65 county of Pottawattamie, and the State of Iowa, and embracing and including its combined railway and wagon bridge now in process of construction across the Missouri river, from the foot of Douglas street in the city of Omaha, Nebraska, to the foot of Broadway street in the city of Council Bluffs, Iowa, and its street railway and motor line now in process of construction

across said bridge, and in the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and all appurtenances now and hereafter existing in connection therewith and appurtenant thereto, together with its purchased lands and other lands necessary to the use thereof, with all side tracks, turnouts, rolling stock, equipments and materials, all rights of way, and tracks, depot and shop grounds tenements, hereditaments including and meaning to include all the property, real or personal, now acquired, or which may hereafter be acquired, by the said company in the States of Nebraska and Iowa, used for and pertaining to or relating to the use and operation of the said bridge and railway and street-car and motor lines so conveyed, all future extensions and branches under any franchises that may be hereafter acquired, and also the rents, issues, incomes, tolls, profits, monies, rights, benefits and advantages derived or to be derived, had or received therefrom by this company in any way whatever to secure the payment of the said bonds mentioned in the foregoing resolutions, with interest thereon.

Resolved, That the board of directors of this company under advice of counsel, cause said bonds and said mortgage to be pre-
66 pared, and when prepared to cause the same to be duly executed as aforesaid in order to accomplish the object of these resolutions, and that the same when prepared be spread upon the records of this company. And

Whereas, a preamble and resolutions, the same and to the same effect as the foregoing, passed and adopted by the stockholders of the Omaha and Council Bluffs Railway and Bridge Company, have been duly passed and unanimously adopted by the board of directors of the party of the first part, and

Whereas, said bonds and this indenture have also been duly authorized, approved and confirmed by resolutions of the board of directors of the party of the first part, and

Whereas, in pursuance of said resolutions and authority, and as authorized to do by virtue of the laws of the States of Nebraska and Iowa, the said Omaha and Council Bluffs Railway and Bridge Company, the party of the first part, has determined to issue said bonds, and to secure the payment of same, principal and interest, by this mortgage or trust deed, the same bonds to be payable, principal and interest, in gold coin of the United States, of or equal in weight or fineness to the present standard, the said bonds to stand equally and ratably secured hereby without any preference whatever arising from the time of issue or otherwise, and to be issued as required for the purpose aforesaid, and in manner and on conditions as herein provided, and each of said bonds to be duly executed by and under the seal of the party of the first part, signed by its president or
67 vice-president, and attested by the treasurer, and interest warrants, warrant or coupons, to be authenticated by or with the name of the treasurer engraved thereon, and each of said bonds so signed, sealed, executed and authenticated is to be countersigned or certified by the said party of the second part, in its capacity as trustee, which countersigning or certifying shall be conclusive and the only sufficient proof that the said bonds are secured by this in-

denture, and each of which bonds is substantially in the following form: (Here follows copy of bond and coupons, etc., and the instrument is duly signed and acknowledged by the Omaha and Council Bluffs Railway and Bridge Company, by John T. Stewart, president, and the Mercantile Trust Company, by E. L. Montgomery, vice-president.)

15th. Paragraph 12 of stipulation in case of J. W. Crossland, *et al.*, *vs.* The Omaha and Council Bluffs Railway and Bridge Company of Nebraska, in superior court of Council Bluffs, Iowa, which said paragraph was as follows, to wit:

12. That in pursuance of said agreement, the said company did construct an additional line of street railway on the streets whereon the said Council Bluffs Street Railway Company had theretofore maintained a line of railway, making a double-track railway, and also constructed a line of railway on Fifth avenue, South First street and Twenty-first street, in the city of Council Bluffs, and extended said line further on Broadway on said street and extended
68 the same along Broadway and Avenue A to the Missouri river and across the railway and wagon bridge owned and constructed by the defendant company across the Missouri river, constructed and extended said line into the city of Omaha, Nebraska, and has since then equipped and continued to maintain and operate all of said lines with electricity as a motor power and as a line for the transportation of passengers and carries the United States mail between the city of Omaha, Nebraska, and the city of Council Bluffs, Iowa.

16th. Section 358 of Cobbey's Consolidated Statutes of Nebraska, edition of 1881, which section was as follows, to wit:

SECTION 358. That any corporation organized under the laws of any other State or States, Territory or Territories, which has filed, or may hereafter file, with the secretary of state of this State a true copy of its charter or articles of association, shall, on filing with the secretary of state a certified copy of a resolution adopted by the board of directors accepting the provisions of this act, be and become a body corporate of this State.

All of the above and foregoing testimony and records and different instruments in writing were objected to, at the time they were offered in evidence, by the defendants as incompetent, immaterial and irrelevant. These objections did not extend to the formal matters of proof, and it was agreed and stipulated between the parties that the objections should be ruled upon by the court at the time of
the rendition of judgment, and if judgment should be ren-
69 dered for plaintiff the objections were to be held overruled and if for defendants to be held sustained.

T. J. EVANS, being called on the part of the plaintiff, testified as follows:

I reside in this city and was connected with the organization of the movement that constructed the motor line and bridge across the Missouri river. The Omaha or Nebraska corporation constructed the

bridge. That company issued the bonds and the mortgage and got the money. The Iowa corporation had nothing whatever to do with the building of the bridge and it did not borrow any money or put in any money. John T. Stewart was the first president of the Iowa corporation. J. H. Millard was treasurer of the Nebraska corporation, and George F. Wright, I think, of the Iowa corporation.. The Nebraska corporation received the tax voted by the citizens. I was manager of construction until the bridge was completed in September, 1888. No stock was issued by the Council Bluffs corporation.

Plaintiff rests.

The defendants, to sustain the issues on their part, introduced the following testimony:

GEORGE F. WRIGHT, being called by the defendant-, testified as follows:

70 The Omaha and Council Bluffs Railway and Bridge Company of Nebraska never acted under the first articles of incorporation, and no notice was ever published of them. The second articles were the ones under which they acted, and they were filed with the secretary of state and notices published and all legal, statutory requirements complied with. The Iowa corporation was first organized, and after we had progressed a time under it we deemed it necessary that we should organize in Nebraska as an adjunct to the Iowa corporation. After we got our franchise from Congress we found, from the language of the act, that it was necessary for the company to organize in Nebraska in order to take the franchise from the Government and have the benefits of it. This bridge extends from the eastern shore of the Missouri river in Council Bluffs, Iowa, to the western shore of said river in Omaha, Nebraska, and it connects two States. These two companies have always been officered by the same officers, and have always had the same owners and the same stockholders. They were always treated as one and the same concern, except that they were divided in this way, that is, one organized in each State. The officers of the Nebraska corporation were the same as the officers of the Iowa corporation. The bridge, for which this tax was voted, was constructed. At the time the tax was paid J. H. Millard was treasurer of the Iowa company and of the Nebraska company. There was but one treasurer and all funds from both corporations were paid into the hands of Mr. Millard as treasurer. I was secretary of both companies and all records of the proceedings of both companies have been kept up.

71 Cross-examination:

The first articles of the Nebraska corporation were prepared by myself and were taken over there and filed for record; there were objections to them, and afterwards they were taken and revised and the new articles adopted. The principal place of business of the

Iowa corporation is Council Bluffs and that corporation was to have its principal place of business here. By the terms of the articles of incorporation of the Nebraska corporation, its principal place of business was Omaha. We have a branch office of the Nebraska company in Council Bluffs, where we do the principal business. The election of officers of the Nebraska corporation is done in Nebraska, but the principal business of the company is transacted at the car-house in Council Bluffs, where we have a branch office of that company and the main office of the Iowa company. The moneys collected, of course, are sent to Mr. Millard at Omaha. He is treasurer of the company and has a bank there. The Iowa corporation is kept up, and owns all this property.

Redirect examination:

John T. Stewart, the president of the Nebraska corporation, has always lived in Iowa, and I have always been secretary of that corporation and have always lived in Iowa. The directors of that corporation have been equally divided, part living in Iowa and part in Nebraska. The principal business of both corporations is done in Council Bluffs, where the main office is.

72 Recross-examination:

Most of the meetings of the directors of both corporations are held at the car-house in Council Bluffs.

Witness excused and then recalled by defendants.

This stipulation, filed in the case of J. W. Crossland *et al. vs.* The Omaha and Council Bluffs Railway and Bridge Company, of Nebraska, I did not sign. It was signed by Mr. Baldwin. Where it speaks in the stipulation of "the railroad and wagon bridge owned and constructed by the defendant company across the Missouri river," this is a mistake. The bridge is not owned by the Nebraska company; it is owned by both companies and is operated by the Nebraska company. The officers of the company did not know that Mr. Baldwin had signed such a stipulation or statement, anyway it is a mistake of fact.

Recross-examination:

I am the Mr. Wright who is a member of the firm of Wright & Baldwin. As a matter of fact the property is owned by both companies. It is leased in the manner set out in the contract, to the Omaha company. There was no other transfer or lease.

Defendants rest.

The above and foregoing was all of the evidence introduced or offered to be introduced on the trial of said cause, and the above and foregoing abstract contains all of the evidence that was introduced or offered to be introduced on the trial of said cause.

73 Thereupon the court took said cause under advisement, and afterwards, to wit: on the 10th day of February, 1894, entered judgment for the plaintiff and against the defendants, in words and figures following, to wit:

Judgment Entry.

Now on this 10th day of February, 1894, this cause comes on for judgment, the cause having heretofore and at the April term, 1893, of said court, been duly submitted to the court on the pleadings and proofs adduced by the parties and arguments of the counsel, and it having been stipulated and agreed by the parties in open court that the cause should be submitted to the court, to be by the court determined in vacation as of the last day of the April term, 1893, of said district court, and the court having considered the evidence and the arguments of counsel, and being fully advised in the premises, finds that the transfer and assignment to the defendant, The Omaha and Council Bluffs Railway and Bridge Company, of Nebraska, by the defendant Omaha and Council Bluffs Railway and Bridge Company, of Iowa, of certain taxes voted by the taxpayers of the *the* city of Council Bluffs, Iowa, to aid said Iowa corporation, defendant, in the construction of a highway bridge across the Missouri river, was *ultra vires* and void and of no force and effect and that said transfer and assignment conferred upon the Nebraska corporation, defendant, no right to take or receive the taxes so voted and paid by the tax-payers of the city of
74 Council Bluffs, Iowa, to aid in the construction of said railway and highway bridge across the Missouri river; that the plaintiff and his assignors had paid to the county treasurer of Pottawattamie county taxes levied and assessed to aid the Iowa corporation in the construction of said bridge in the sum and amounts as claimed by plaintiff in his petition; that the said taxes so levied and assessed against plaintiff and his assignors and by them paid to the county treasurer aforesaid *was* by said county treasurer paid over to and received by the defendant, The Omaha and Council Bluffs Railway and Bridge Company of Nebraska, that the payment to and receipt of said money by the said Nebraska corporation, defendant was without warrant or authority of law and that the plaintiff is entitled to judgment against said defendant for the amount thereof, with six per cent. interest thereon from the date of payment to said defendant Nebraska corporation and that the allegations of plaintiff's petition have been sustained by the proof and that plaintiff is entitled to judgment against the Nebraska corporation defendant for the amount of said payment so made, together with interest thereon as hereinbefore provided.

It is therefore, ordered, considered and adjudged by the court that the plaintiff, Spencer Smith, do have and recover of and from the defendant Omaha and Council Bluffs Railway and Bridge Company of Nebraska, the sum of thirteen thousand four hundred twenty-five and sixty-two one-hundredths dollars ($13,425.62), together with the costs of this action taxed at — and that this judg-

ment bear interest at six per cent. per annum from the date
75 of its rendition until it shall be paid and that execution issue for the collection thereof. It is further ordered, considered and adjudged by the court that the plaintiff's petition be dismissed as to the other defendant herein, to which plaintiff accepts. To all of which the defendant at the time excepts and by agreement of the parties has ninety days from the date of this judgment, to wit: February 10th, 1894, to settle and file bill of exceptions.

To the entering of which judgment the defendants at the time duly excepted, and by agreement of parties and order of court the defendants had ninety days from that date within which to settle and file a bill of exceptions herein, and their bill of exceptions was settled and filed within that time.

On the 7th day of April, 1894, the defendants herein perfected their appeal to the supreme court of the State of Iowa, by serving proper notice of said appeal upon T. S. Campbell, clerk of the district court of Pottawattamie county, Iowa, and upon Harl & McCabe, attorneys of record of plaintiff, and also by filing their supersedeas bond in said court, and by securing said clerk his fees for a transcript.

The above and foregoing is a full, true and correct abstract of the whole record in this case.

Assignment of Errors.

1. The court erred in entering up judgment for the plaintiff.

76 & 77 2. The court erred in not entering up judgment for the defendants.

3. The court erred in admitting the testimony offered by the plaintiff and objected to by the defendants, and as shown by the record in this cause.

4. The court erred in refusing to admit the testimony offered by the defendants and objected to by the plaintiff, as shown by the record in this cause.

5. The court erred in admitting the mortgage executed by the Omaha and Council Bluffs Railway and Bridge Company, of Omaha, Nebraska, to the Mercantile Trust Company, of New York.

6. The court erred in refusing to enter up judgment for the defendants in this case.

7. The court erred in holding that the plaintiff was entitled to recover against the defendants in this case.

8. The court erred in holding that from all the evidence in the case, the plaintiff was entitled to the relief prayed for in his petition.

WRIGHT & BALDWIN,
Attorneys for Appellants.

* * * * * * *

78 And on the 15th day of Dec., 1894, the appellee filed in the office of said clerk a printed amendment to abstract, the same being duly served and in the words and figures following, to wit:

79 In the Supreme Court of Iowa, January Term, 1895.

Spencer Smith, Appellee, *vs.* Omaha & Council Bluffs Railway & Bridge Company, a Corporation of the State of Nebraska, and Omaha & Council Bluffs Railway & Bridge Company, a Corporation of the State of Iowa, Appellants.	In Equity.

Appeal from the district court of Pottawattamie county, Hon. H. E. Deemer, judge, presiding.

Harl & McCabe, attorneys for appellee.
Wright & Baldwin, attorneys for appellants.

Appellee's Amendment to Abstract.

80 Appellee's amendment to abstract.

Comes now the appellee and makes the following amendments and additions to appellants' abstract to correct errors and omissions therein:

The amended and substituted answer was filed after a motion had been filed by the plaintiff and sustained by the court requiring the defendants to divide and number the counts and defenses in their answer.

After the filing of said amended and substituted answer, plaintiff filed demurrer to the fifth count of defendants' amended and substituted answer and the defense pleaded therein on the following grounds:

First, that it constituted no defense to plaintiff's cause of action in that, on the facts stated in the petition, the parties paying the tax wrongfully procured and appropriated by the defendants as in the petition alleged, are by themselves or their assignees entitled to maintain action for the recovery thereof.

Second, because it was not a mere suit for the recovery of taxes wrongfully paid, but for the payment of moneys wrongfully
81 and unjustly procured by defendants, said moneys being at the time the property of plaintiff's assignors.

Third, because the moneys paid by the tax-payers of Council Bluffs in settlement of the tax assessed against them to aid in the construction of a motor-line bridge remained the property of the persons paying said taxes until the same had been justly earned by and paid to the proper persons by said treasurer and that, as shown by the allegations of the petition and not denied by said count of defendants' answer, said moneys never were in fact earned by defendants or either of them and defendants never became entitled thereto and their procurement from the treasurer was the wrongful appropriation of property of plaintiff's assignors to the use and benefit of the defendants.

And demurring to the sixth count of defendants' answer and the

substantive defense therein pleaded, for that plaintiff's action is brought to recover moneys of plaintiff's assignors had and received by the defendants to their use and benefit, that the statute of limitations therein did not begin to run until the wrongful receipt and appropriation by the defendants of said moneys, which said wrongful receipt and appropriation is shown to have been within five years of the date of instituting the present suit, and this action is not barred by the statute of limitation-.

Second, because the statute of limitations did not begin to run at the time of the vote and levy of the tax, but from the time of the wrongful receipt and appropriation of the proceeds of said tax by the defendants.

82 Third, because it affirmatively appears upon the face of the petition that the plaintiff's cause of action is not barred by the statute of limitations.

Which said demurrer was sustained by the court on May 4, 1893.

It was admitted that at the time of the matters involved in this action, the city of Council Bluffs was a municipal corporation organized as a city of the first class, under the laws of Iowa.

The claim assigned to plaintiff and which assignments were introduced in evidence were for amounts aggregating the amount of the judgment rendered against the defendants in this cause and were the amounts paid by the plaintiff's respective assignors on the tax levied to aid the defendant Iowa corporation in the construction of its bridge across the Missouri river, as shown by the treasurer's tax books, which were introduced in evidence.

It was admitted that the moneys paid by the plaintiff's assignors were paid by them as taxes upon their property on the tax voted, levied and assessed against said property to aid the Omaha & Council Bluffs Railway & Bridge Company, Iowa corporation, in the construction of a highway bridge across the Missouri river and that said taxes so paid by the plaintiff's assignors were included in the moneys paid J. H. Millard, treasurer, covered and evidenced by the receipts of the said J. H. Millard set out on pages 39 and 40 of appellant's abstract.

83 It was admitted that there was but one railway and highway bridge across the Missouri river constructed under and by virtue of any charters in this case, and it was the only bridge with which either of the defendants had any connection.

It was admitted that $220,000 of the stock of the Omaha & Council Bluffs Railway & Bridge Company, Nebraska corporation, was issued to Hopkins & Scully in payment of substructure of the bridge and $460,500 of said stock issued to Edgemore Iron Company in payment of the construction of bridge proper, and further admitted that $750,000 of the capital stock of the Omaha & Council Bluffs Railway & Bridge Company, Nebraska corporation, was issued to the stockholders of the Omaha & Council Bluffs Railway & Bridge Company, Iowa corporation, as provided in the contract and lease set out on pages 40 to 44 of appellants' abstract.

The paragraph 12 of the stipulation in the case of J. W. Crossland *et al. vs.* Omaha & Council Bluffs Railway & Bridge Company

of Nebraska, set out on page 67 of appellants' abstract, was a paragraph of a stipulation filed in said case, then pending in the superior court of the city of Council Bluffs, wherein the plaintiffs were seeking to recover from the appellant for the cost of the paving between the rails and one foot outside thereof, as provided in the ordinance of the city of Council Bluffs, and refers to the appellant, the Nebraska corporation, by the words "said company," as used in said paragraph 12, as set out in appellants' abstract.

84 All contracts, ordinances, receipts, certificates, mortgages, records, and articles of incorporation set out in appellants' abstract and in this amendment to abstract were admitted to be correct and genuine and all objection thereto on account of same being copies of records and all objections with reference to failure to produce or account for the originals thereof and all formal objections thereto were expressly waived, or objections alleged to said instruments admitting their verity and admissibility, save and except the competency or the materiality of the facts thereby established.

T. J. Evans.

In addition to the testimony of this witness as set out in appellants' abstract, he testified as follows:

The Omaha or Nebraska corporation constructed the bridge. The Nebraska corporation executed bonds and mortgage and got the money thereon and with the proceeds of the bonds and mortgage constructed the bridge. The Iowa corporation had no money in the bridge and had no money to put in. The stockholders of the Iowa corporation paid nothing on their stock and no money was borrowed by it. The first organization of the Iowa corporation was about all that was done with that organization. I was the president and afterward the minutes were made up and John T. Stewart named particularly as president. He was never elected. These minutes were made up within the three years last past. The records were made to conform to the lease by the Iowa to the Nebraska corporation. The Nebraska corporation received the

85 tax voted by the citizens of Council Bluffs to aid in the construction of the bridge, receiving same from the treasurer of Pottawattamie county, Iowa. I was the treasurer of the Nebraska corporation and manager of the construction until after the completion and putting into effect or operation the bridge, which was about October 1, 1888.

George F. Wright.

Add to the testimony of this witness as follows:

The Nebraska corporation was organized to have an organization in both States. At the time the tax was voted, the bridge was in contemplation of construction. The first articles of incorporation were objected to by some of the stockholders of the Nebraska corporation and they desired that they be withdrawn and submitted to Judge Lake and myself, claiming that Judge Lake was better versed in the laws of Nebraska, corporation laws, and that they

would feel more secure if they were passed under his supervision. On April 1, the new articles were submitted to the board and a reorganization effected and those articles adopted.

The statement at the close of the cross-examination of the witness, Geo. F. Wright, as set out on p. 71 of appellants' abstract, is incorrect. What the witness did say is as follows: "Well, the Iowa corporation owns all of this property in one sense. That is to say, under the contract we made, this lease; but it has its proportion of the *pro rata* of the property the same as the other—that is, to carry out that form."

Redirect examination:

86 Last spring, we amended the articles of incorporation of the Nebraska company, striking out that provision that one-half of the directors must reside in Iowa. Up until this year, one-half always resided here and one-half in Omaha.

Recross-examination:

The annual meetings of the stockholders of the Nebraska corporation are held in Omaha. The bridge was built by the Omaha company. There was no other transfer or sale between these companies, except the lease offered in evidence. The Nebraska company issued the bonds and provided the money to construct the bridge. They were the bonds of the Nebraska company and the money was received by it and the only contract or arrangement between the companies with reference to it was this lease and contract that was introduced in evidence. The Nebraska corporation executed the mortgage and the bonds and they were executed for the purpose of providing money for the construction of the bridge and were used for the construction of the bridge and the bridge was built out of that money.

HARL & McCABE,
Attorneys for Appellee.

86 And said cause was submitted to said court at the October term thereof, 1895, on the foregoing record, and on the 9th day of April, 1896, said court filed its decision (opinion) in writing, the same being in the words and figures following, to wit:

88 In the Supreme Court of Iowa, January Term, 1896.

SPENCER SMITH
vs.
THE OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE CO., a Corporation Organized under the Laws of Iowa, and The Omaha & Council Bluffs Railway & Bridge Co., a Corporation Organized under the Laws of the State of Nebraska, Appellants.

From Pottawattamie district court, Hon. H. E. Deemer, judge.

APRIL 9, 1896.

This is an action at law brought by the plaintiff on a claim of his own and as assignee of the claims of a number of other tax-

payers of the city of Council Bluffs to recover certain taxes which he and they paid to aid in the construction of a bridge over the Missouri river between the cities of Council Bluffs, Iowa, and Omaha, Nebraska.

89 The facts and issues will appear in the opinion.

The case was tried to the court and judgment rendered in favor of the plaintiff for $13,425.62.

The defendants appealed and assigned as error the entering of said judgment and certain rulings of the court in admitting and refusing to admit certain testimony.

Wright & Baldwin, for appellants.
Harl & McCabe, for appellee.

GIVEN, *J.*:

1. The defendant corporations being organized under the same name, we will, for convenience and brevity, designate one as the Iowa corporation and the other as the Nebraska corporation.

There is but little dispute as to the facts of this case, and the following is a sufficient statement of the facts for an understanding of the questions to be considered:

The Iowa corporation was organized under the laws of Iowa in October, 1886. Its purpose, as expressed in its articles, is as follows: "To construct, operate, and maintain a bridge across the Missouri river at and opposite the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and also a steam, electric, motor, horse, elevated, cable, or other line of railway and a public way across said bridge and within the counties of Douglas, Nebraska, and Pottawattamie, Iowa, with the termini thereof in the said cities of Omaha and Council Bluffs."

On October 29, 1886, the city of Council Bluffs passed an ordinance authorizing said Iowa corporation, "its successors and

90 assigns, to construct, equip, maintain, and operate for the term of twenty-five years" a street railway in the streets of said city as specifically set forth in said ordinance. Said ordinance was duly accepted by said Iowa corporation on the 30th day of October, 1886.

On Nov. 2, 1886, a special election was duly held in the city of Council Bluffs to determine whether a tax of twelve mills per centum on the assessed valuation of the property of said city should be levied for the purpose of aiding said Iowa corporation "in the construction of a highway bridge over the Missouri river at a point commencing at the foot of Broadway street or within 300 feet thereof on either side in the city of Council Bluffs, Iowa, at and opposite the same in Iowa and terminating opposite in the city of Omaha, Nebraska." A majority of the votes polled being for this taxation, the tax was thereafter duly assessed, levied, and collected.

The Missouri river being navigable and subject to the jurisdiction of the United States, Congress passed an act March 3, 1887, authorizing "the Omaha & Council Bluffs Railway & Bridge Co.,

an incorporation organized under the laws of the States of Nebraska and Iowa, to construct and maintain a bridge across the Missouri river." This act also authorized said bridge to be used as a combined railway and wagon bridge.

It will be observed that the authority conferred by Congress was to "the Omaha & Council Bluffs Railway & Bridge Co., an incorporation organized under the laws of the States of Nebraska and Iowa," and that at that time only the Iowa corporation was in existence.

It seems probable that because of this phraseology in the act of Congress, and the fact that the bridge was to be constructed over a river dividing two States, it was thought necessary to
91 organize a corporation under the laws of Nebraska.

On April 1, 1887, the Nebraska corporation was organized for the purpose as stated in its articles as follows:

"The general nature of the business to be transacted by the corporation shall be to construct, operate, and maintain a bridge across the Missouri river at and opposite the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and also a steam, electric, motor, horse, elevated, cable, or other line of railway, and a public way across said bridge and within the counties of Douglas, Nebraska, and Pottawattamie, Iowa, with the termini thereof in the said cities of Omaha and Council Bluffs."

On May 14, 1887, said corporations entered into a contract in writing, which was duly executed and acknowledged.

Said contract, among other things, provides as follows:

First. The said Omaha & Council Bluffs Railway & Bridge Company of Council Bluffs, Iowa, for the consideration hereinafter named, hereby sells, assigns, transfers, and sets over to the said Omaha and Council Bluffs Railway and Bridge Company of Omaha, Nebraska, all that certain tax of twelve mills per centum on the assessed valuation of the property in the city of Council Bluffs voted to the said Omaha and Council — Railway and Bridge Company of Council Bluffs, Iowa, by the electors of the said city of Council Bluffs, Iowa, on the 2nd day of November, A. D. 1886, to aid in the construction of a highway bridge over the Missouri river between the cities of Omaha, Nebraska, and Council Bluffs, Iowa, together with the right and the authority to receive the same as and when collected by and from the treasurer of Pottawattamie county, Iowa, the same as the said party of the first part could do under
92 the provisions of chapter XIII of the laws of Iowa, passed in the year 1888, being the Session Laws of the Twenty-first General Assembly of the State of Iowa, and the said party of the first part agrees, if so requested, to receive said tax when and as collected by and from said treasurer and pay the same over to the party of the second part when so demanded.

By said contract the Iowa corporation leased to the Nebraska corporation for the term of ninety-nine years all its rights, interest, and property under said ordinance and act of Congress.

In consideration of this tax and lease the Nebraska corporation agreed "to give in full consideration therefor to the said party of

the first part, for the benefit of its stockholders, one-half of all the shares of the full paid-up capital stock of the said Omaha & Council Bluffs Railway & Bridge Co. of Omaha, Nebraska, the receipt whereof is hereby acknowledged."

A bridge as contemplated was constructed and completed in December, 1888, and has ever since been maintained as a motor line and wagon bridge.

Of the tax so voted and collected there is no question but that the plaintiff and his assigns paid a sum equal to the amount of the judgment rendered, and that this amount was paid by the treasurer of Pottawattamie county to "J. H. Millard, treasurer of the Omaha & Council Bluffs Railway & Bridge Co."

There is some dispute as to whether this payment was to the Iowa or to the Nebraska corporation.

The Iowa corporation never issued any stock, and after the execution of said contract did not transact any business in the way of constructing, maintaining, or operating said bridge or street railways. The stock given by the Nebraska corporation was
93 issued directly to the subscribers to the stock of the Iowa corporation. The bridge was constructed under contracts made by the Nebraska corporation with other persons, and it and the street railways have ever since been maintained and operated by that corporation.

II. The tax in question was voted, assessed, and collected under the provisions of chapter 13, Laws of the 21 G. A., sec. 1, which is as follows:

"Taxes not to exceed five per centum on the assessed value of any incorporated city having five thousand inhabitants may be voted to construct or to aid any company which is or may be incorporated under the laws of the State of Iowa in the construction of a highway bridge, commencing or terminating in such city, across any navigable boundary river of the State of Iowa."

The expediency of such legislation has often been doubted, and it has been uniformly held that such statutes should be strictly construed. Bean *vs.* Charlton, 27th Wisc., 525. It seems to us clear that this statute limits the giving of such aid to corporations organized under the laws of this State.

Appellant contends that, as such bridges cannot be built without authority from the United States and the adjoining States, it must have been contemplated that corporations from both States must join in the enterprise, and therefore it was not intended to restrict the aid to the domestic corporation.

The Iowa corporation had authority from its State and the United States under which it could build to low-water mark on the Nebraska shore, and it does not appear that it could not have obtained the right under the laws of Nebraska to have built upon the Nebraska shore.

Appellant also refers to that part of sec. II of said chapter
94 XIII which provides that the terms and conditions expressed in the notice for the election "shall become obligatory and binding upon such company and its successors and assigns." It

does not follow that because the domestic corporation may have "successors and assigns" that such aid may be given to foreign corporations. Said sec. 1 expressly limits it to Iowa corporations, and sec. 3 emphasizes the limitation by providing that the money is to be paid not to a foreign corporation nor to any corporation that may perform the conditions upon which it was voted, but "to the treasurer of such company to whom such aid is voted."

It is certainly clear that such aid cannot be given to a foreign corporation and that such a corporation cannot become entitled to aid voted to a domestic corporation by merely performing the conditions upon which it was voted.

III. There is no question but that the Iowa corporation was entitled to this aid upon performing the conditions upon which it was payable. This it was not required to do with its own hands, but might do by contracts with other persons or corporations, domestic or foreign, and assign its right to the aid payment.

Appellant's contention is that this bridge was constructed by the Nebraska corporation under said written contract for the Iowa corporation. Appellee contends that said contract is contrary to public policy, *ultra vires*, and void, and therefore neither party to it acquired any rights under it. By said contract the Iowa corporation sold, assigned, transferred, and set over to the Nebraska corporation "all of said tax, together with the right and authority to receive the same when collected by and from the treasurer of Pottawattamie county, Iowa," and leased for ninety-nine years all its rights, interests, and property under said ordinance and act of Congress.

95 In return for this the Nebraska corporation made but a single promise, namely, "to give in full consideration therefor to the said party of the first part for the benefit of its stockholders one-half of all the shares of the full paid-up capital stock of the said Omaha & Council Bluffs Railway and Bridge Company of Omaha, Nebraska."

While to enjoy these franchises it was necessary that the Nebraska corporation should build the bridge, it surely did not obligate itself to the Iowa company to do so.

For the tax and lease it gave the one-half of its paid-up capital stock, and it remained with it to build the bridge or not, so far as the Iowa corporation is concerned, and had it failed to do so the Iowa corporation would have no grounds of complaint. Appellant cites State *vs.* Omaha & Council Bluffs Railway & Bridge Company, 60 N. W. Rep., 122, an action to forfeit the charter and franchises of the Iowa corporation on the ground that it had abandoned its rights to corporate existence. We said in that case that the Iowa corporation is the owner of said bridge and railway, subject only to the rights of the Nebraska corporation and its mortgagees therein. The question involved in that case was the right of the Iowa corporation to continue to exist as a corporation, and the rights that would revert to it on the termination of said lease were given as a reason why its corporate existence should not be ended.

The ownership of the bridge was not involved, and the remark

relied upon by the appellant was applicable to the property and franchise held by the Iowa corporation rather than to the bridge itself. It was not intended then nor do we intend now to determine who will own the bridge at the termination of said lease, as that question is not before us.

96 Our present inquiry is whether the bridge was built under contract for the Iowa corporation, and our conclusion is that it was not. While we still think the Iowa corporation has the right to exist as such, to the end that it may exercise the franchises given it when its lease thereof is terminated, it is plain that since the execution of said written contract it has transacted no other business and had none other to transact than the preservation of its corporate existence. It did not construct the bridge, nor have it constructed; it was constructed by the Nebraska corporation on its own motion and for itself, and therefore it cannot be said that the Iowa corporation has earned the aid. If it has not earned it, then surely the Nebraska corporation was not entitled to it. As said written contract does not provide for the construction of the bridge, we need not determine whether it is void or not.

The only conclusion that can be reached from this record is that the Nebraska corporation, having secured a lease of the Iowa corporation's franchises, went on and built the bridge at its own expense and for itself and was not entitled to the aid voted to the Iowa corporation.

It is said in argument that the tax was paid to the Iowa corporation. If so, it was paid by it to the Nebraska corporation, and, as neither was entitled to it, the manner of the payment is immaterial.

It is also argued that, as the conditions upon which the aid was voted were fully carried out, there was a compliance with the spirit and intent of the statute. It is undisputed that statutes like this are to be strictly construed. Thus construed, it is plain that aid is limited to Iowa corporations, and to hold under the facts of

97 this case that the Nebraska corporation is entitled to this aid is to ignore that part of the statute which limits its provisions to Iowa corporations.

Appellants insist that it is immaterial by which corporation the bridge was built, and cite Reeves *vs.* Continental R. R. Co., 152 Pa. State, 154.

In that case the city council had by ordinance consented to the operation of a street railway by overhead electric wires, and the company owning the railway was specifically named in the ordinance, but the company to which it was leased for a term of years was not mentioned. It was held that the consent was that the thing should be done by the two corporations acting together as one, and that such consent was meant to be operative as to both corporations.

The court says: "The scope of legislative acts, whether statutes or ordinances, is to be determined by the intention of the enacting body."

As already stated, we think it was clearly the intention of the

enacting body that only domestic corporations could become entitled to the aid provided for in said chapter 13.

Appellants also cite Muscatine & Western Railway Co. *vs.* Horton, 38 Iowa, 33; Parsons *vs.* Childs, 36 Iowa, 108; C. M. & St. P. R'y Co. *vs.* Shea, 67 Iowa, 729.

These cases were decided under statutes authorizing the vote of the tax to aid in the construction of railways without any limitation or reference to the person or corporation by whom to be constructed, and therefore are not applicable to this case.

IV. Section IV of said chapter XIII provides that "should the taxes levied under the act remain in the county treasury more than one year after the same shall have been collected, the right to them shall be considered forfeited, and the same shall be refunded
98 to the tax-payers."

Appellant contends that this provision is the only one under which the tax-payers can recover the taxes paid by them, and that, as this tax did not remain in the treasury more than one year, plaintiff is not entitled to recover.

This provision does not relate to a recovery from one who may have wrongfully received the tax; it simply fixes the time and conditions upon which the treasurer shall refund the tax, and is not to the exclusion of any right of action that may arise in favor of the tax-payer against other persons. Barnes *vs.* Marshall, 56 Iowa, 20.

"Where money is paid under the provisions of the law for voting taxes in aid of the construction of railroads, it has been held that such money in the hands of the treasurer is a trust fund, and that the tax-payer and the railroad company are both beneficiaries." Eyerly *vs.* Supervisors, 77 Iowa, 472. In the same case, 81 Iowa, at page 193, it is said: "It is shown that Galusha while treasurer wrongfully paid out money to which plaintiff is entitled, and that such payment was made before this action was commenced.

It thus appears that plaintiff can obtain no relief by mandamus which would not be afforded in the ordinary course of the law, and the relief in this action must therefore be denied."

Until the money in question was earned as contemplated in said chapter XIII it remained the property of the tax-payers, held in trust to await performance of the conditions. The conditions not being performed as contemplated in said chapter, the tax-payers were not divested of their right in the money, and have a right to action to recover on account thereof from any person who
99 wrongfully withholds it.

We think the judgment of the district court is correct, and it is therefore affirmed.

Deemer, J., took no part.

99*a* And on the 9th day of April, 1896, a final judgment was rendered against the said appellants (plaintiffs in error), and the following is a true and correct copy of said judgment entry:

"SPENCER SMITH *vs.* THE OMAHA & COUNCIL BLUFFS R'Y & Bridge Co. of Nebraska, Omaha & Council Bluffs R'y & Bridge Co. of Iowa, Appellants.	Appeal from Pottawattamie Dist. Court.

In this cause, the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellants pay the costs of this appeal, taxed at $79.75, and that execution issue therefor."

99*b* And afterwards, on the dates respectively endorsed thereon, there were filed in the office of the clerk of said court petition for writ of error, writ, assignment of errors, and citation, true and correct copies of which have been retained in said clerk's office, and the originals are hereto attached and returned herewith as a part of the return to said writ of error.

100 Filed Nov. 10, 1896. C. T. Jones, clerk supreme court.

In the Supreme Court of the State of Iowa.

SPENCER SMITH, Appellee, *vs.* OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE Company of Nebraska and Omaha & Council Bluffs Railway & Bridge Company of Iowa, Appellants.	Petition for Writ of Error.

To the Hon. J. H. Rothrock, chief justice of the supreme court of Iowa:

Your petitioners, The Omaha & Council Bluffs Railway & Bridge Company of Nebraska and The Omaha & Council Bluffs Railway & Bridge Company of Iowa, would most respectfully represent that in the above-entitled cause, which has been finally determined by this court, there is a Federal question involved, to wit, that the defendants and appellants herein claim the right, title, and privilege under the statutes of the United States to exercise their rights as corporations of the States of Nebraska and Iowa respectively, and under the acts of the Congress of the United States claim immunity from the demand of the plaintiff and appellee herein to recover back the taxes which were levied and collected by the defendants to aid in the construction of their bridge across the Missouri river.

That this cause involves the construction of an act of the Congress of the United States, to wit, an act of Congress approved March 3, 1887, authorizing the Omaha & Council Bluffs Railway &

Bridge Company, an incorporation organized under the laws of the States of Nebraska and Iowa, to construct and maintain a bridge across the Missouri river.

That the decision of this court is against the right, title, privileges, and immunities claimed by the defendants under the above-entitled act of Congress.

101 That your petitioners file herewith in the office of the clerk of this court and bring herewith their supersedeas bond in the sum of twenty thousand ($20,000.00) dollars, with good and sufficient sureties, conditioned as required by the laws and rules of the Supreme Court of the United States.

Wherefore your petitioners most respectfully pray that a writ of error be granted, directed to the judges of the supreme court of the State of Iowa, commanding that the record in this cause be certified to the Supreme Court of the United States, and that a citation issue as provided by law, and that a stay of all proceedings be ordered until such error shall have been heard and determined.

THE OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY OF NEBRASKA AND
THE OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY OF IOWA,
By WRIGHT & BALDWIN,
Their Attorneys.

A writ of error is hereby allowed as prayed for in the foregoing petition this 7th day of November, 1896, and *procedendo* shall not issue from this court, and upon the filing of a supersedeas bond in an amount of twenty thousand dollars, with sureties to be approved by the clerk of this court, all proceedings herein shall be stayed until final determination by the Supreme Court of the United States.

JAS. H. ROTHROCK,
Chief Justice of the Supreme Court of Iowa.

101*a* [Endorsed:] In the supreme court of Iowa. 17416. Spencer Smith, appellee, *vs.* O. & C. B. R'y & B. Co. of Nebraska *et al.*, appellants. Petition for writ of error. Filed Nov. 10, 1896. C. T. Jones, clerk supreme court. Op., Ap'l 9, '96.

102 Filed Nov. 17, 1896. C. T. Jones, clerk supreme court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1896, thereof, between Spencer Smith, plaintiff, and The Omaha & Council Bluffs Railway & Bridge Company of Nebraska and The Omaha & Council Bluffs Railway &

Bridge Company of Iowa, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distintly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, in the District of Columbia, and filed in the office of the clerk of the Supreme Court of the United States on or before the 28th day of November, 1896, to the end that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of November, in the year of our Lord one thousand eight hundred and ninety-six.

Issued at office, in the city of Council Bluffs, Iowa, with the
103 seal of the circuit court of the United States for the southern district of Iowa, dated as aforesaid.

[Seal of Circuit Court of the United States, Southern District of Iowa.]

JOHN J. STEADMAN,
Clerk of the Circuit Court of the United States for the Southern District of Iowa, Western Division.

Allowed by—
JAMES H. ROTHROCK,
Chief Justice of the Supreme Court of the State of Iowa.

103*a* [Endorsed:] Spencer Smith *vs.* O. & C. B. R'y & B. Co. of Nebraska *et al.* Writ of error. Filed Nov. 17, 1896. C. T. Jones, clerk supreme court.

104 Filed Nov. 10, 1896. C. T. Jones, clerk supreme court.

In the Supreme Court of the State of Iowa.

SPENCER SMITH, Appellee, *vs.* OMAHA & COUNCIL BLUFFS RAILWAY & Bridge Company of Nebraska and Omaha & Council Bluffs Railway & Bridge Company of Iowa, Appellants.	Assignment of Errors.

The Omaha & Council Bluffs Railway & Bridge Company of Nebraska and Omaha & Council Bluffs Railway & Bridge Company of Iowa, appellants above named and plaintiffs in error, respectfully

state that there is manifest error on the face of the record in the above-entitled cause in the following particulars, to wit:

1. That the court erred in affirming the judgment of the court below.

2. That the court erred in holding that the act of Congress of the United States approved March 3rd, 1887, authorizing "the Omaha & Council Bluffs Railway & Bridge Company, an incorporation organized under the laws of the States of Nebraska and Iowa, to construct and maintain a bridge across the Missouri river," did not give to the plaintiffs in error herein the right to construct the bridge across the navigable Missouri river.

3. The court erred in holding that it was not necessary to obtain from the Congress of the United States the right under the act of Congress above referred to to construct said bridge across said Missouri river.

4. The court erred in construing said act of Congress against these plaintiffs in error and in not granting to them the rights, privileges, and immunities they claimed under the issues in this case and which said act granted and gave to them.

5. The court erred in holding that the legal effect of the
105 incorporation acts of the defendants under said act of Congress was to make the plaintiff in error The Omaha & Council Bluffs Railway & Bridge Company of Iowa a foreign corporation.

6. The court erred in holding that the plaintiff in error The Omaha & Council Bluffs Railway & Bridge Company of Iowa had no right or lawful authority to receive the tax voted in aid of the construction of said bridge by the citizens of Council Bluffs, Iowa.

7. The court erred in not holding that the incorporation of the plaintiffs in error, in pursuance of the said act of Congress, was merely incidental and as an aid for the purposes for which the plaintiff in error The Omaha & Council Bluffs Railway & Bridge Company of Iowa was formed.

8. The court erred in holding that the incorporation of the Omaha & Council Bluffs Railway & Bridge Company of Nebraska in connection with the Iowa company, in order to take the grant under said act of Congress, prevented the Omaha & Council Bluffs Railway & Bridge Company of Iowa from receiving the tax voted by the citizens of Council Bluffs, Iowa.

9. The court erred in holding that "the Iowa corporation had authority from its State and the United States under which it could build to low-water mark on the Nebraska shore, and it does not appear that it could not have obtained the right under the laws of Nebraska to have built upon the Nebraska shore."

10. The court erred in holding that the Omaha & Council Bluffs Railway & Bridge Company of Iowa was not the owner of the bridge in question.

11. The court erred in holding that the bridge in question was not built under the contract in question for the Omaha & Council Bluffs Railway & Bridge Company of Iowa.

12. The court erred in holding that the defendant in error
106 was entitled to recover for himself and his assignors the tax which was paid to the plaintiff in error The Omaha & Council Bluffs Railway & Bridge Company of Iowa.

13. The court erred in not finding for the plaintiffs in error under all the evidence and the law in this case.

14. The plaintiffs in error pray and ask for a reversal of the judgment in this case.

WRIGHT & BALDWIN,
Attorneys for Plaintiffs in Error.

106*a* [Endorsed:] In supreme court of Iowa. 17416. Spencer Smith *vs.* O. & C. B. R'y & B. Co. of Nebraska *et al.* Assignment of errors. Filed Nov. 10, 1896. C. T. Jones, clerk supreme court.

107 Filed Nov. 17, 1896. C. T. Jones, clerk supreme court.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Spencer Smith:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the 28th day of November, 1896, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the southern district of Iowa, central division, wherein The Omaha & Council Bluffs Railway & Bridge Company of Nebraska and The Omaha & Council Bluffs Railway & Bridge Company of Iowa are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Dated November 10th, 1896.

JAMES H. ROTHROCK,
Chief Justice of the Supreme Court of Iowa.

Service of the foregoing citation accepted and copy thereof acknowledged this 16th day of November, 1896.

HARL & McCABE,
Attorneys for Spencer Smith.

107*a* [Endorsed:] In supreme court of Iowa. Spencer Smith *vs.* O. & C. B. R'y & B. Co. of Nebraska *et al.* Citation. Filed Nov. 17, 1896. C. T. Jones, clerk supreme court.

108 STATE OF IOWA, *ss:*

I, C. T. Jones, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record, opinion, and final judgment in the case of Spencer Smith, appellee, *vs.* The Omaha & Council Bluffs R'y & Bridge Co. of Ne-

braska and The Omaha & Council Bluffs R'y & Bridge Co. of Iowa as full, true, and complete as the same is of record and on file in my office.

And I further certify that I have retained in my office true and correct copies of petition for writ of error, writ of error, assignment of errors, and citation, and the originals are hereto attached as a part of this transcript and returned herewith as part of the return to said writ, and this return is made in obedience to said writ of error.

In testimony whereof witness my signature and official seal, at Des Moines, Iowa, this 19th day of November, 1896.

[Seal of the Supreme Court of Iowa.]

C. T. JONES,
Clerk Supreme Court, Iowa.

Endorsed on cover: Case No. 16,451. Iowa supreme court. Term No., 672. The Omaha & Council Bluffs Railway & Bridge Company of Nebraska & The Omaha & Council Bluffs Railway & Bridge Company of Iowa, plaintiffs in error, *vs.* Spencer Smith. Filed December 12, 1896.

166-719

Office Supreme Court, U. S.
FILED.
FEB 5 1897
JAMES H. KELLY,
CLERK

166-719

Motion to Dismiss for Lack of Jurisdiction.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 672.

THE OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY OF NEBRASKA AND THE OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY OF IOWA, PLAINTIFFS IN ERROR,

vs.

SPENCER SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

(16,451)

Motion to Dismiss for Lack of Jurisdiction.

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vs.

SPENCER SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

(16,451)

Comes now Spencer Smith, defendant in error in above entitled cause, by W. S. Strawn, his attorney, and moves the court to dismiss the writ of error in this case issued, for reason that this court is without jurisdiction to interfere with the judgment rendered by the state court, for that:

a. No federal question is presented by the record.

b. It affirmatively appears from the record that no federal question was raised in, presented to or considered by the state court.

c. It affirmatively appears from the record that no right of plainfiff in error created or protected by the constitution, statutes or other laws of the United States was involved in the controversy decided by the state court.

d. It affirmatively appears from the record that the decision and judgment complained of involved no more than a construction of an Iowa statute, such decision defining the limitations imposed by the statute to exercise of power granted municipal bodies to vote tax in aid of public enterprises.

e. The judgment and opinion complained of disclose, first, that no federal right or question was by the state court considered or determined; and, second, that determination of any federal right or question was wholly unnecessary to sustain the judgment rendered.

Subject to the ruling upon the foregoing motion, and in event of a holding that jurisdiction lies in this court, the defendant in error, by his attorney aforesaid, further moves the court to affirm the judgment of the state court, for reason that is manifest, from the record, that said writ was sued out and is prosecuted for delay only, and that the question upon which the jurisdiction of this court is invoked is so frivolous as to need no further argument than a mere statement of the facts established by the record.

And defendant moves that, by reason of these facts, he be awarded damages to extent of 10 per cent upon the judgment by the state court rendered.

W. S. Strawn.

W. S. STRAWN,
Attorney for Defendant in Error.



166-719

166-719

Office Supreme Court, U. S.
FILED.
FEB 5 1897
JAMES H. McKENNEY,
CLERK.

Brief of Defendant in Error in Support of Motion to Dismiss

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 672.

THE OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY OF NEBRASKA AND THE OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY OF IOWA, PLAINTIFFS IN ERROR,

vs.

SPENCER SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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Brief of Defendant in Error in Support of Motion to Dismiss

SUPREME COURT OF THE UNITED STATES.

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vs.

SPENCER SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

(16,451)

STATEMENT.

In 1886 was enacted Chapter 13 of the acts 21st General Assembly, all material portions of which are the following.

Sec. 1. That taxes not to exceed five per centum on the assessed value of any incorporated city having over five thousand inhabitants may be voted to construct, or to aid any company which is or may be incorporated under the laws of the State of Iowa, in the construction of a highway bridge, commencing or terminating in such city, across any navigable boundary river of the State of Iowa.

Sec. 2. Whenever a petition shall be presented to the council of any incorporated city containing the population herein provided, signed by a majority of the resident freehold tax payers of said city, asking that the question of the construction or aiding any company incorporated under the laws of the State of Iowa in the construction of a highway bridge over such river, be submitted to the voters thereof, it shall be the duty of the council of such incorporated city to immediately give notice of a special election, by publication in some newspaper published in such city, and also by posting copies of such notice in five public places in such incorporated city at least ten days before such election, which notice shall specify the time and place of holding such election, and in case of a petition to vote aid to such incorporated company, the name of the company proposed to be aided, minimum rate per centum of the tax to be levied, the amount which the board of supervisors are instructed and authorized to cause to be collected each year, and, in case of proposed aid to said company, said notice to also state the amount of work required to be done on such bridge and any other condition which shall be performed before said tax, or any part thereof, shall become due, collectible or payable, until the conditions are complied with by such company; such notice may also contain terms and couditions to be performed by such company receiving such aid, after the completion of such bridge, which terms and conditions shall become obligatory and binding upon such company and its successors and assigns. At such election, the question of taxation shall be submitted to the electors of such incorporated city and the form of the ballots shall be: "For taxation" and "Against taxation," and if a majority of the votes polled be "For taxation," then the clerk of such city shall forthwith certify to the county auditor of the county in which such city is situated the result of said election, the maximum rate per

centum of tax thus voted, the year during which the same is to be be collected, the amount to be collected each year and, provided aid is voted to such incorporated company, the name or designation of such company and the terms and conditions upon which the same, when collected, is to be paid to such company, together with an exact copy of the notice under which such election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds of the county. When such certificate shall have been recorded, the board of supervisors of the county shall, at the time of the levying of the ordinary taxes, levy each year on the taxable property of such incorporated city such taxes as are voted under the provisions of this act, as shown by said certificate, and cause the same to be placed on the tax lists of said incorporated city. Said taxes shall be collected in the same manner and subject to the same laws, after they are collected or collectible, as other taxes, in conformity with the terms and conditions of the notice submitting the question of taxation to said electors.

Sec. 3. The moneys collected under the provisions of the act shall be paid out by the county treasurer to the treasurer of such company to whom such aid is voted for the purpose of such highway bridge, or the treasurer of such incorporated city, upon the order of the president or a majority of the directors of such company, or the order of the council of such incorporated city, at any time after such council, or a majority of its members, shall have certified to the county treasurer that the conditions required as set forth in the notice for the special election at which the tax was voted have been complied with; and said council, or a majority of its members, shall make such certificate whenever such conditions shall have been so performed.

Sec. 4. Should taxes levied under the provisions of this act remain in the county treasury more than one year after the same shall have been collected, the right to them shall be considered forfeited and the same shall be refunded to the tax payers, and the board of supervisors shall cause the same to be cancelled and stricken from the tax books of the county, which cancellation shall remove all liens created by the levy of said taxes.

In October, 1886, the Omaha & Council Bluffs Railway & Bridge Co. of Iowa, was incorporated under the laws of that state, or-

ganized to construct and operate a bridge between Omaha and Council Bluffs, as well as a railway in and between those cities.

October 29, 1886, Council Bluffs, by ordinance, granted franchise to said Iowa corporation to build and operate a street railway upon its streets, the ordinance, among other things, obligating "said railway and bridge company" to construct a bridge to Omaha and certain portion of its track within two years from passage of the ordinance.

This ordinance was duly accepted by the Iowa corporation, October 30, 1886. (pp. 14 to 16 Record.)

A petition requesting submission of question of aid to said Iowa corporation was duly signed by the requisite number of electors and such steps in due course taken that election was ordered, which election resulted in approval of a 12 mill tax.

The notice of election (pp. 18, 19 and 20, Record) designated the Iowa corporation as the party to be aided, and provided that the tax should be paid "to the treasurer of said company," and further gave notice that the name of this company and the terms and conditions of the grant should be certified to the county auditor—the notice in these respects in all ways conforming to the statute.

By act of Congress, approved March 3, 1887, authority was granted "the Omaha & Council Bluffs Railway & Bridge Company, an incorporation organized under the laws of the states of Nebraska and Iowa," to build and maintain a bridge across the Missouri river. (pp. 26, 27, 28, Record.)

April 1, 1887, was incorporated the Omaha & Council Bluffs, Railway & Bridge Company of Nebraska. (pp. 9 to 12. Record.

Neither the incorporators nor the directors selected were identical in these two companies.

The Iowa corporation issued no stock and never had assets.

The majority of its incorporators simply ignored its existence or were by it ignored, if it retained power to act.

May 14, 1887, the said Iowa corporation undertook, by contract, to transfer to the Nebraska corporation the tax that had been voted to aid it in the construction of a bridge and to convey by lease for ninety-nine years the right of the Iowa corporation in, first, the Council Bluffs Street Railway franchise; second, the fran-

chise to construct and maintain a bridge over the Missouri river, "the same being transferred to the said party of the second part to have, use and enjoy during said term, as fully and to the same extent and under the same terms, conditions and restrictions as the said party of the first part is entitled to do" by the terms of the franchises.

For this tax and lease, the Nebraska corporation was to transfer to the Iowa corporation, for the benefit of its stockholders, one-half of the stock of the Nebraska corporation. (pp. 21 to 23, Record.)

This stock was issued, not to the Iowa corporation nor to all of the incorporators of the Iowa company, but to such as became members of the Nebraska corporation.

It will be observed that no transfer was made to the Nebraska corporation of either contracts or property. It had taken no steps toward construction of the bridge. "The Iowa corporation had no money in the bridge and none to put in. The stockholders of the corporation paid nothing on their stock and no money was borrowed by it. The first organization of Iowa corporation was about all that was done with that organization." (p. 42, Record, testimony Evans.)

The tax voted was duly collected by the county treasure and J. H. Millard, treasurer "Omaha & Council Bluffs Railway & Bridge Company," applied for and received same from the county treasurer. (pp. 20, 21, Record). It was as treasurer of the Nebraska corporation that Millard received the money. (p. 42, Record, Evans.)

To recover the sums collected from him and from his assignors under the proceedings above described, this suit was brought by defendant in error herein, his contention being that tax might lawfully be imposed under the statute in aid only of an Iowa corporation, to enable such corporation to build the bridge, and could be paid only to such corporotion after it had performed its undertaking; that the Nebraska corporation was by the terms of the statute excluded from earning the tax and was incapable of taking anything under the assignment from the Iowa company; that the Iowa corporation had neither itself built the bridge nor contracted with the Nebraska corporation to construct one for its benefit (petition pp. 1 to 6, Record). The answer, after general denial and certain admissions, averred that plaintiff, neither in law nor in equity, had right to

maintain the action, because not the real party in interest, as the petition on its face showed the proceeding to be for the recovery of a tax, and a private individual could not maintain such action, then pleaded the statute of limitations. (pp. 6, 7, Record.)

It thus clearly appears that but two ultimate facts were really in issued: First (a legal question), could a foreign corporation earn this tax? Second (one of fact), was this tax earned by the Iowa corporation?

The recorda ffirmatively shows that the only legal question at any time mooted was the construction of an Iowa statute, that question being as to whether the acts by these corporations done brought them within its purview.

It just as clearly appears that no Federal question was either pleaded or otherwise raised or presented. See assignment of errors in Iowa Supreme Court (p. 39, Record) and opinion of that court, (p. 44, et. seq) nor was such question considered or determined by the court, nor was such question necessarily involved in the judgment, nor even properly a matter of consideration.

For this reason it is respectfully submitted that the writ of error should be dismissed.

W. S. STRAWN,
Attorney for Defendant in Error.